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In The

Supreme Court of the United States

VICKIE LYNN MARSHALL,

Petitioner,

v.

E. PIERCE MARSHALL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Markham v. Allen*, 326 U.S. 490, 494 (1946), this Court held that Congress did not confer on the federal courts jurisdiction to "probate a will or administer an estate." In the intervening sixty years, some federal circuits have hewn closely to *Markham*, while others have significantly expanded the scope of the so-called "probate exception," holding that it ousts otherwise proper federal jurisdiction even over claims between parties that are "ancillary" or "related" to probate. Here, the Court of Appeals aligned itself with circuits that have broadly applied the probate exception, holding that although bankruptcy jurisdiction over petitioner's claim was otherwise proper under 28 U.S.C. § 1334, that jurisdiction could not be exercised because petitioner's claim was "probate related."

These decisions represent an irreconcilable split among the circuits over the scope of the probate exception. Accordingly, the questions presented are:

1. What is the scope of the probate exception to federal jurisdiction?

2. Did Congress intend the probate exception to apply where a federal court is not asked to probate a will, administer an estate, or otherwise assume control of property in the custody of a state probate court?

3. Did Congress intend the probate exception to apply to cases arising under the Constitution, laws, or treaties of the United States (28 U.S.C. § 1331), including the Bankruptcy Code (28 U.S.C. § 1334), or is it limited to cases in which jurisdiction is based on diversity of citizenship?

4. Did Congress intend the probate exception to apply to cases arising out of trusts, or is it limited to cases involving wills?

PARTIES TO PROCEEDINGS BELOW

The parties to the proceedings below are Vickie Lynn Marshall and E. Pierce Marshall.

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PETITION FOR WRIT OF CERTIORARI

It has been sixty years since this Court last addressed the so-called "probate exception" to federal jurisdiction. *Markham v. Allen*, 326 U.S. 490 (1946) was the last of a long series of decisions in which the Court held that although Congress has not given the federal courts *in rem* jurisdiction to probate wills or administer decedents' estates, where federal jurisdiction is otherwise proper in actions *between parties*, it may be exercised even if the actions concern probate assets or issues.

Since *Markham*, many circuits have deviated from this Court's probate-exception jurisprudence. While three circuits have hewn closely to *Markham* and its predecessors, others, including the Ninth Circuit in the present case, have applied the probate exception much more broadly, holding that federal courts may not entertain even *inter partes* claims that are in some fashion "ancillary" or "related" to probate, or that state law assigns to probate courts. A multiplicity of tests have developed, leading to inconsistent and unpredictable results.

The alarm has been sounded by many commentators. *See, e.g.*, John F. Winkler, *The Probate Jurisdiction Of The Federal Courts*, 14 Prob. L.J. 77, 135 (1997) ("The 'probate exception' . . . imposes limits so vague that the actions or relief it bars cannot be ascertained. Many courts have relied on formulaic standards that mask the absence of any coherent analysis. Others have been driven to impose arbitrary rules. Still others have confessed that no specific rules of application can be identified."); Peter Nicolas, *Fighting the Probate Mafia: A Dissection Of The Probate Exception To Federal Court Jurisdiction*, 74 S. Cal. L. Rev. 1479, 1483 (2001) (decrying the widespread "confusion as to [the] scope" of the probate exception). The alarm also has been repeatedly sounded by the circuit courts themselves. *See, e.g., Golden v. Golden*, 382 F.3d 348, 358 (3d Cir. 2004)

("Various descriptions of the probate exception over the years often seem to substitute one opaque verbal formulation for another."); *Storm v. Storm*, 328 F.3d 941, 943 (7th Cir. 2003) ("[T]he precise contours of the probate exception have not been – nor really can be – clearly defined."); *Mangieri v. Mangieri*, 226 F.3d 1, 2 (1st Cir. 2000) ("'the precise scope of the probate exception has not been clearly established'") (quoting *Georges v. Glick*, 856 F.2d 971, 973 (7th Cir. 1988)); *Ashton v. Josephine Bay Paul & C. Michael Paul Found., Inc.*, 918 F.2d 1065, 1071 (2d Cir. 1990) ("The probate exception is 'one of the most mysterious and esoteric branches of the law of federal jurisdiction.'") (quoting *Dragan v. Miller*, 679 F.2d 712, 713 (7th Cir. 1982)); *Rice v. Rice Found.*, 610 F.2d 471, 475 (7th Cir. 1979) ("the probate exception is not easily applied to particular cases").

There thus can be little question that this Court's intervention is needed to clarify the scope of federal probate jurisdiction. The present opinion is a particularly appropriate candidate for this Court's review, for a number of reasons:

- The opinion deepens the uncertainty over the scope of the probate exception by expressly rejecting the approaches of at least five other circuits, in favor of the approach adopted by just one court. Appendix ("App.") at 26-27.
- The opinion takes the probate exception into uncharted waters by applying it to divest a federal court of the plenary bankruptcy jurisdiction conferred by Congress, expressly rejecting another circuit's holding that the probate exception does *not* apply to bankruptcy jurisdiction. App. at 24-26.
- The opinion permits a significant, nonstatutory encroachment on federal subject matter jurisdiction that lacks any discernable principles to guide judicial discretion.

- The opinion conflates *res judicata* and subject matter jurisdiction, an approach recently repudiated by this Court in *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. __, 125 S. Ct. 1517 (2005).
- The opinion interprets the probate exception expansively, applying it to an *inter partes* tort action that exists independently of the decedent's death, does not challenge the validity of decedent's testamentary documents, does not involve the administration of a probate estate and cannot affect any probate estate assets.

The confused state of the law on the scope of the probate exception has here permitted a federal court to reject jurisdiction over a properly-filed federal bankruptcy claim essentially because a related claim was pending in a state probate court. Earlier this term, this Court corrected a similar avoidance by a federal court of its obligation to hear a properly-filed federal case. In the context of the *Rooker-Feldman* doctrine, this Court cautioned federal courts against "overriding Congress' conferral of federal-court jurisdiction concurrent with jurisdiction exercised by state courts," and it stressed that "'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.'" *Exxon Mobil Corp.*, 125 S. Ct. at 1521, 1526-27 (quoting *McClellan v. Carland*, 217 U.S. 268, 282 (1910)). The probate exception must be clarified so as to prevent an equally significant surrender of federal jurisdiction functionally identical to that condemned in *Exxon Mobil*.

The long-brewing conflicts among the circuits and the questions surrounding the nature and scope of the probate exception make this issue more than ripe for this Court's resolution. This Court should take this opportunity to bring order to the chaos and grant certiorari.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 392 F.3d 1118. App. at 1-38. The opinions of the United States District Court for the Central District of California are reported at 275 B.R. 5 and 264 B.R. 609. App. at 39-188. The opinions of the United States Bankruptcy Court for the Central District of California are reported at 257 B.R. 35 and 253 B.R. 550. App. at 189-221.

JURISDICTION

The Court of Appeal issued its opinion on December 30, 2004. It denied rehearing and rehearing *en banc* on February 16, 2005. App. at 222.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction was proper in the district court and Court of Appeals pursuant to 28 U.S.C. §§ 1331 and 1334.

STATUTES INVOLVED

The text of 28 U.S.C. §§ 1331, 1332 and 1334 are set out in the Appendix to this Petition, at pages 223-226.

STATEMENT OF THE CASE

Shortly before his death, J. Howard Marshall II ("Howard") was one of the wealthiest men in Texas, with assets exceeding $1.6 billion. App. at 40, 149-50. When he died, his will and testamentary trust named his son, respondent E. Pierce Marshall ("Pierce"), as the sole beneficiary. App. at 55. Howard had attempted to provide for his wife, petitioner Vickie Lynn Marshall ("Vickie"), through a separate, *inter vivos* trust that would have supported her throughout her life. App. at 78-85, 133-36,

204-05, 215-17, 219-20. His efforts failed, however, because – as both lower courts found – Pierce suppressed or destroyed the trust instrument and stripped Howard of all his assets before his death. App. at 86-136, 202-07, 216-19.

After Howard died, Vickie filed for bankruptcy. App. at 41. Pierce filed a proof of claim for defamation in the bankruptcy action, and Vickie filed a mandatory counterclaim alleging, among other things, tortious interference with an *inter vivos* trust. App. at 42-43.

The bankruptcy court summarily resolved Pierce's defamation claim against him. App. at 43. It then tried Vickie's tortious interference claim, finding that Howard intended to create an *inter vivos* trust for Vickie, but that Pierce tortiously prevented it. App. at 202-07, 216-19. The Court also found that Pierce engaged in "massive discovery abuse," including destroying a substantial quantity of documents relevant to Vickie's claim. App. at 207-13. Accordingly, the court awarded Vickie compensatory damages of more than $449 million (the amount of the intended trust), plus punitive damages of $25 million. App. at 199, 221.

Meanwhile, Pierce offered Howard's will for probate in Texas. App. at 41. When Pierce's brother contested the will, Vickie joined. Years later, she filed a tortious interference claim against Pierce in the probate court. *Marshall v. Marshall (In re Marshall)*, 273 B.R. 822, 825-26 (Bankr. C.D. Cal. 2002).

After the bankruptcy court entered judgment for Vickie, she voluntarily dismissed her Texas claim. *Marshall v. Marshall (In re Marshall)*, 271 B.R. 858, 866 (C.D. Cal. 2001). Pierce then amended his pleadings to pursue additional claims against Vickie. *Marshall*, 273 B.R. at 826. After a trial, the probate court concluded that Howard's will was valid and admitted it to probate. App. at 5-6.

Pierce appealed the bankruptcy judgment to the district court. App. at 44. There, he urged dismissal for lack of subject matter jurisdiction pursuant to the so-called "probate exception." The court held the probate exception did not apply because the bankruptcy court "did not assert jurisdiction generally over the probate proceedings for J. Howard, Sr. or take control over the estate's assets," and because Texas law did not require that Vickie assert her claim in a probate court. App. at 158-70. The court then reviewed Vickie's claim *de novo*, independently concluding that Howard directed his lawyers to prepare an *inter vivos* trust for Vickie, but that Pierce suppressed or destroyed it. App. at 40, 46, 86-136. The court also found "overwhelming" evidence of Pierce's "willfulness, maliciousness, and fraud." App. at 145. Accordingly, it awarded Vickie compensatory damages of nearly $44.3 million, plus punitive damages of an additional $44.3 million. App. at 137-47.[1]

Pierce appealed to the United States Court of Appeals for the Ninth Circuit. The Court held the probate exception applied and, hence, there was no federal subject matter jurisdiction over Vickie's claim. App. at 1-38.

Vickie filed a timely petition for rehearing and rehearing *en banc*, which was denied February 16, 2005. App. at 222.

[1] Like the bankruptcy court, the district court found that Howard intended to give Vickie half the increase in the value of his assets from the date of their marriage. However, the district court valued the increase as of the date of Howard's death, while the bankruptcy court valued it as of the date of trial. Accordingly, the district court reduced Vickie's compensatory damages even though it found that "the facts are much more egregious than even the bankruptcy court suspected and found." App. at 144.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. THE PROBATE EXCEPTION, AS ARTICULATED BY THIS COURT, IS A NARROW, CONGRESSIONALLY-MANDATED LIMITATION ON FEDERAL PROBATE JURISDICTION.

A. This Court Has Repeatedly Held That There Is Federal Jurisdiction Over Probate-Related Actions *Between Parties*.

In decisions dating to the early nineteenth century, this Court has articulated what lower federal courts have termed the "probate exception" to federal jurisdiction. In these decisions, this Court held there is no federal jurisdiction to probate wills or administer decedents' estates. The exception is a narrow one, however: The Court consistently has held that if federal jurisdiction is otherwise proper,

> whenever a controversy in a suit *between . . . parties* arises respecting the validity or construction of a will, or the enforcement of a decree admitting it to probate, there is no more reason why the Federal courts should not take jurisdiction of the case than there is that they should not take jurisdiction of any other controversy between the parties.

Gaines v. Fuentes, 92 U.S. 10, 22 (1876). In other words,

> "A citizen of another State may establish a debt against the estate. But the debt thus established must take its place and share of the estate as administered by the probate court; and it cannot be enforced by process directly against the property of the decedent. In like manner a distributee, citizen of another State, may establish his right to a share in the estate, and enforce such adjudication against the administrator personally, or his sureties, or against any other parties

> subject to liability, or in any other way which does not disturb the possession of the property by the state court."

Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33, 44 (1909) (quoting *Byers v. McAuley*, 149 U.S. 608, 620 (1893)) (citations omitted).

Thus, for example, in *Payne v. Hook*, 74 U.S. 425 (1868), this Court held that although a state probate action was then pending, there was federal jurisdiction over a plaintiff's suit to obtain her intestate share of her brother's estate. According to the Court, were it to conclude otherwise,

> an important part of the jurisdiction conferred on the Federal courts by the Constitution and laws of Congress, would be abrogated. As the citizen of one State has the constitutional right to sue a citizen of another State in the courts of the United States, instead of resorting to a state tribunal, of what value would that right be, if the court in which the suit is instituted could not proceed to judgment, and afford a suitable measure of redress?

Id. at 429-30.

Similarly, in *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33, this Court held there was federal jurisdiction over a claim that a charitable bequest in a decedent's will failed and, accordingly, plaintiff was entitled to part of the decedent's estate. The Court explained,

> This court has uniformly maintained the right of Federal courts of chancery to exercise original jurisdiction (the proper diversity of citizenship existing) in favor of creditors, legatees, and heirs, to establish their claims and have a proper execution of the trust as to them.

Id. at 43.

And, in *McClellan v. Carland*, 217 U.S. 268 (1910), the Court held there was federal jurisdiction to decide whether plaintiffs were "the sole heirs at law and next of kin of said decedent, and entitled to inherit the estate, real and personal." *Id.* at 275-76. The Court explained that the suit "was within the original jurisdiction of the circuit court of the United States" because "the chancery jurisdiction of the Federal courts to entertain suits between citizens of different states to determine interests in estates ... existed from the beginning of the Federal government." *Id.* at 281. Thus, the circuit court erred in staying the federal action until a state suit could be resolved:

> It ... appeared upon the record presented to the circuit court of appeals that the circuit court had practically abandoned its jurisdiction over a case of which it had cognizance, and turned the matter over for adjudication to the state court. This it has been steadily held, a Federal court may not do.

Id.[2]

The Court has given at least two explanations for the so-called probate exception. In *Gaines v. Fuentes*, the Court explained that a proceeding to probate a will is "one *in rem*, which does not necessarily involve any controversy between parties." 92 U.S. at 21. Thus, "the proceeding is not within the designation of cases at law or in equity *between parties of different States*, of which the Federal courts have concurrent jurisdiction with the State courts under the Judiciary Act." *Id.* at 22 (emphasis added).

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[2] *See also Byers v. McAuley*, 149 U.S. at 618-22 (where parties were citizens of different states, federal court had jurisdiction to determine validity of handwritten will and cousins' intestate succession rights); *Gaines v. Fuentes*, 92 U.S. 10 (federal court had jurisdiction over suit to restrain enforcement of probate decree against owners of property claimed by decedent's heir).

However, if a controversy arises between parties concerning the validity or construction of a will or the enforcement of a decree admitting it to probate, "there is no more reason why the Federal courts should not take jurisdiction of the case than there is that they should not take jurisdiction of any other controversy between the parties." *Id.*

In other cases, the Court has explained that because the Judiciary Act of 1789 gave federal courts jurisdiction over "suits of a civil nature *at common law or in equity*," 1 Stat. 73 (emphasis added), federal jurisdiction is coextensive with the jurisdiction of the English common law and chancery courts in 1789. *Markham*, 326 U.S. at 494. Since the probate of wills and the administration of decedents' estates were thought to be within the exclusive jurisdiction of England's ecclesiastical courts, federal jurisdiction did not include these matters. *Id.* at 494; *In re Broderick's Will*, 88 U.S. 503, 512 (1874). However, suits by heirs to establish their rights to probate estates were held to be outside the probate exception because, by the eighteenth century, English chancery courts routinely heard such suits. *Waterman*, 215 U.S. at 43.

B. *Markham v. Allen.*

This Court last addressed the probate exception in *Markham v. Allen*, 326 U.S. 490. *Markham* arose out of the death of a California resident who willed property to German citizens. The will was admitted to probate in state court, where decedent's American heirs claimed his entire estate because California law prevented German citizens from inheriting. *Id.* at 492. While the probate action was pending, the Alien Property Custodian, a federal officer, sued in federal court claiming he was entitled to the decedent's entire net estate. *Id.* The appellate court dismissed the action, holding that because the claim was within the probate court's jurisdiction, "'its

right to proceed to determine heirship cannot be interfered with by the federal court.'" *Id.* at 493.

This Court reversed. It held that although there is no federal jurisdiction "to probate a will or administer an estate," federal courts have jurisdiction over "suits 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate 'to establish their claims'" so long as they do not "interfere with the probate proceedings" or "assume general jurisdiction of the probate or control of the property in the custody of the state court." *Id.* at 494 (quoting *Waterman*, 215 U.S. at 43). The Court defined "interfer[ence] with the probate proceedings" narrowly, explaining that although a federal court may not "disturb or affect the possession of property in the custody of a state court," it *may* exercise jurisdiction

> to adjudicate rights in such property where the final judgment does not undertake to interfere with the state court's possession *save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court.*

Id. (emphasis added).

The Court held there was no improper interference with probate because, although the federal judgment awarded plaintiff decedent's *entire net estate*, it left "undisturbed the orderly administration of decedent's estate in the state probate court and decree[d] petitioner's right in the property to be distributed after its administration." *Id.* at 495. "This, as our authorities demonstrate, is not an exercise of probate jurisdiction or an interference with property in the possession or custody of a state court." *Id.*

Under *Markham*, thus, the probate exception is extremely narrow. It is violated only when a federal court probates a will or distributes estate assets, not when it merely adjudicates rights to those assets. Indeed, *Markham* teaches that the probate exception is *not* violated

when a federal court adjudicates a claim to estate assets, even if the claim is "against a decedent's estate," and even if a probate court will be "bound by the judgment to recognize the right adjudicated by the federal court." *Id.* at 494.

II. THE COURTS OF APPEAL ARE IRRECONCILABLY IN CONFLICT OVER THE REACH OF THE PROBATE EXCEPTION.

A. The Circuits Are In Conflict As To The Scope Of The Probate Exception.

In the nearly sixty years since *Markham*, the circuit courts have become profoundly split over the scope of the probate exception. The Second, Fifth and Eleventh Circuits (and the Ninth Circuit, before the present case) follow *Markham* and its antecedents closely, applying the probate exception only if a federal court is asked to probate a will or administer a decedent's estate. The Fourth, Sixth, Eighth and Tenth Circuits apply a broader rule, holding there is no federal jurisdiction over any claim that, under state law, would be adjudicated by a state probate court. The First, Third and Seventh Circuits apply a still-broader test, precluding jurisdiction over any claim that is in some fashion "ancillary" or "related" to probate. Finally, the Ninth Circuit in this case, as well as a single panel of the Second Circuit, have combined the two preceding tests to hold that the probate exception applies if a claim is in any manner "related to" probate *or* under state law would be adjudicated only in a probate court.

1. *Markham* test.

The Second, Fifth and Eleventh Circuits have closely followed *Markham* to hold that the probate exception applies only if a federal court is asked to probate a will,

administer a probate estate or "order actual transfer of property under probate." *Turton v. Turton*, 644 F.2d 344, 347 (5th Cir. 1981).[3] According to these courts, "Merely determining the rights to, as opposed to administering, assets is not proscribed by the probate exception." *Ashton v. Josephine Bay Paul and C. Michael Paul Foundation, Inc.*, 918 F.2d 1065, 1072 (2d Cir. 1990). Thus, while a federal court may not directly "distribut[e] . . . any assets" of a decedent's estate, it may adjudicate a party's "'right to share in the estate.'" *Dulce v. Dulce*, 233 F.3d 143, 148 (2d Cir. 2000). One court explained:

> The [probate exception] is easier to apply than to state. Under the heading of "establishing claims," for example, a creditor may obtain a federal judgment that he has a valid claim against the estate for one thousand dollars, or a devisee may obtain a declaratory judgment that a probated will entitles him to twenty percent of the net estate. What a federal court may not do, however, is to order payment of the creditor's thousand dollars, because that would be an assumption of control over property under probate. Similarly, the court may not find that the devisee's twenty percent share is worth $20,000, because it is the province of the probate court to determine the dollar amount of the net estate after liquidating assets and paying claims. Instead, the federal court is limited to declaring the validity of the asserted claims, leaving the claimants to assert

[3] Before the present opinion, the Ninth Circuit also followed *Markham* closely. *See Hilton v. Mumaw*, 522 F.2d 588 (9th Cir. 1975) (probate exception did not bar suit alleging that defendant fraudulently induced decedent to transfer assets out of his estate); *Blacker v. Thatcher*, 145 F.2d 255, 256-57 (9th Cir. 1944) (under this Court's "settled rule," there was federal jurisdiction to resolve dispute between parties over rights under decedent's will, notwithstanding pending state probate action).

> their federal judgments as *res judicata* in the probate court.

Turton, 644 F.2d at 347; *see also Robertson v. Robertson*, 803 F.2d 136, 139 (5th Cir. 1986) (probate exception does not apply where federal judgment "will not disturb the administration of the estate by the [state] court for it will result solely in a decree between the parties to the federal suit"); *Michigan Tech Fund v. Century Nat'l Bank*, 680 F.2d 736, 740 (11th Cir. 1982) ("The probate exception does not foreclose a creditor from obtaining a federal judgment that the creditor has a valid claim against the estate for a certain amount.").

Because under this formulation the probate exception turns on estate *administration*, not the subject matter of the dispute, these circuits have permitted broad federal adjudication of probate-related matters. For example, these circuits have held there is federal jurisdiction to interpret a will, *Michigan Tech Fund*, 680 F.2d at 740 ("will interpretation is within the diversity jurisdiction of the federal courts, and not within the probate exception"); to determine the validity of claims under state forced heirship laws, *Robertson*, 803 F.2d 136; and over a claim for breach of agreement to make a will, *Michigan Tech Fund*, 680 F.2d at 740-41. There also is federal jurisdiction to determine whether disputed assets are part of a decedent's estate, *Ashton*, 918 F.2d at 1071-72; *Michigan Tech Fund*, 680 F.2d at 740-43; whether a judgment is enforceable against a decedent's estate, *Dulce*, 233 F.2d 143; and over a breach of fiduciary duty claim against an executor, *Breaux v. Dilsaver*, 254 F.3d 533 (5th Cir. 2001).

2. State law test.

The Fourth, Sixth, Eighth and Tenth Circuits have held there is no federal jurisdiction over any suit that,

under state law, is within the exclusive jurisdiction of state probate courts. In these circuits:

> "The standard for determining whether federal jurisdiction may be exercised is whether under state law the dispute would be cognizable only by the probate court. If so, the parties will be relegated to that court; but where the suit merely seeks to enforce a claim *inter partes*, enforceable in a state court of general jurisdiction, federal diversity jurisdiction will be assumed."

Rienhardt v. Kelly, 164 F.3d 1296, 1300 (10th Cir. 1999) (emphasis omitted) (citing *McKibben v. Chubb*, 840 F.2d 1525, 1529 (10th Cir. 1988)).[4]

Because in these circuits federal jurisdiction depends on state law, the claims to which the probate exception applies vary greatly. Among the claims held barred are breach of fiduciary duty by an executor or trustee, *Bedo*, 767 F.2d 305; *Lepard*, 384 F.3d at 237; tortious interference, *id.*; *but see Rienhardt*, 164 F.3d at 1301; fraudulent inducement to make a will, *Sianis*, 294 F.2d 994; and undue influence, *Rienhardt*, 164 F.3d at 1300-01; *Turja*, 118 F.3d at 1008-10.

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[4] *See also Beren v. Ropfogel*, 24 F.3d 1226, 1228 (10th Cir. 1994) (same); *Lepard v. NBD Bank*, 384 F.3d 232, 237-38 (6th Cir. 2004) (same); *Turja v. Turja*, 118 F.3d 1006, 1009 (4th Cir. 1997) ("'The law is well settled that the federal courts have no jurisdiction over matters within the exclusive jurisdiction of state probate courts.'") (quoting *Foster v. Carlin*, 200 F.2d 943, 947 (4th Cir. 1952)); *Bedo v. McGuire*, 767 F.2d 305, 305-07 (6th Cir. 1985) (probate exception applied because "under the law of Ohio exclusive jurisdiction of probate matters . . . is vested in the Probate Court"); *Sianis v. Jensen*, 294 F.3d 994, 998 (8th Cir. 2002) (federal jurisdiction over claim that will is invalid "depends on the remedy available to [plaintiff] under [state] law").

3. "'Ancillary' to probate" test.

In the First, Third, and Seventh Circuits, the probate exception applies if a claim is in some fashion "ancillary to" probate. The factors relevant to determining whether this test applies vary; they include the following.

First Circuit: In the First Circuit, suits "'ancillary' to the probate of a will" are barred by the probate exception. Such suits include those "within the jurisdiction of the [probate court]" and those that "would require the district court to set aside the ruling of the probate court." *Mangieri v. Mangieri*, 226 F.3d 1, 2-3 (1st Cir. 2000).

Third Circuit: In the Third Circuit, the probate exception bars claims "'ancillary' to probate," including those that would "assail or contradict a judgment of the probate court" or "challenge management of the estate." However, there is federal jurisdiction over otherwise barred causes of action that "would be maintainable *inter partes* in the state courts of general jurisdiction." *Golden v. Golden*, 382 F.3d 348, 358 (3d Cir. 2004); *see also Moore v. Graybeal*, 843 F.2d 706 (3d Cir. 1988).

Seventh Circuit: In the Seventh Circuit, the probate exception bars claims "'ancillary' to . . . core probate activities." Such claims include those that, if "'maintained in federal court would impair the policies served by the [probate exception].'" Those policies are legal certainty ("ensur[ing] that the outcomes of probate disputes will be consistent by limiting . . . litigation to one court system"), judicial economy ("avoid[ing] the piecemeal or haphazard resolution of all matters surrounding the disposition of the decedent's wishes"), "relative expertness" (vesting jurisdiction in those courts with "greater familiarity with such legal issues"), and "avoid[ing] unnecessary interference with the state system of probate law." *Storm v. Storm*, 328 F.3d 941, 943-44 (7th Cir. 2003) (citing *Dragan v. Miller*,

679 F.2d 712, 714-16 (7th Cir. 1982)); *see also Georges v. Glick*, 856 F.2d 971, 973-74 (7th Cir. 1988).

Courts applying the "ancillary to probate" test have refused jurisdiction over a broad range of probate-related matters, including tortious interference with inheritance, *Storm*, 328 F.3d at 944-47; *Moore*, 843 F.2d 706; *Dragan*, 679 F.2d at 715-17; *but see Golden*, 382 F.3d 348 (claim for tortious interference with inheritance held *not* barred by the probate exception); and breach of fiduciary duty by an executor, *Mangieri*, 226 F.3d 1; *Golden*, 382 F.3d at 361-62.

4. Hybrid test.

The Ninth Circuit in the instant matter, following the approach of a single panel of the Second Circuit, *see Moser v. Pollin*, 294 F.3d 335, 340 (2d Cir. 2002), adopted the broadest definition of the probate exception by combining the "'ancillary' to probate" and "state law" tests. App. at 27-28. Under this hybrid test, the court held the probate exception applies if a claim is "probate related" *or* under state law is within the exclusive jurisdiction of a probate court. App. at 28, 34. A claim is "probate related" if it raises any question "which would ordinarily be decided by a probate court in determining the validity of the decedent's estate planning instrument." App. at 28-29. Included in this expansive definition are "*all claims* regarding distribution of" decedent's assets, including "'what [the decedent] had and what he did with it and whether that was proper or improper.'" App. at 30 (emphasis added).

The extraordinarily broad sweep of the hybrid test is starkly illustrated by the present case. Here, Vickie's cause of action for tortious interference was against Pierce individually and made no claim against her husband's probate estate or testamentary trust, App. at 166; thus, it could have had no effect on estate administration. Vickie's

claim also did not implicate her husband's testamentary intent, but rather his donative intent during his lifetime. *Marshall*, 271 B.R. at 867. Nor did her claim challenge the validity of his will or testamentary trust; to the contrary, it assumed those documents were valid. App. at 28, 166-67.[5] Instead, Vickie claimed – and the district court found – that her husband intended to create a *separate inter vivos* trust for her benefit, but that Pierce tortiously prevented him from doing so. App. at 132-37. Had the trust survived, it would have existed independently of, and had no effect on the validity of, the testamentary documents before the probate court. Moreover, because Vickie would have become the beneficial owner of the trust *during Howard's lifetime*, *Marshall*, 271 B.R. at 867, her claim against Pierce existed while Howard was still alive. Finally, Vickie's claim did not depend on Pierce receiving Howard's assets – her claim would have existed even if his wealth had been transferred to someone else.

Thus, under the rule articulated by the Ninth Circuit, the probate exception could apply to *any* claim related to assets held by a decedent before or at his death, regardless of the nature of the claim or the claim's utter lack of impact on probate administration.

[5] Though the district court examined evidence of the suspicious circumstances surrounding the execution of the testamentary trust, Vickie's claim does not rest upon the assertion that the will or testamentary trust are invalid. According to the court, "Although there is evidence that J. Howard's Living Trust was forged or tampered with, that is only some evidence of Pierce's tortious interference, and evidence to negate Pierce's contention that J. Howard had no donative intent." June 12, 2002 Order Den. Counter-Defendant's Mot. To Stay J. Pending Appeal, U.S.D.C. Docket No. 442, p. 4 n.2.

B. The Circuits Are In Conflict As To Whether The Probate Exception Applies To Federal Question Cases.

This Court has never directly addressed whether the probate exception applies to federal question cases generally or to bankruptcy cases specifically.[6] The Eleventh Circuit has twice considered the issue, holding that the probate exception does *not* apply to federal question cases. In *Glickstein v. Sun Bank/Miami*, 922 F.2d 666, 672 n.13 (11th Cir. 1991), the Court held that "the probate exception is an exception to diversity jurisdiction and has no application to the federal RICO claims." The Court similarly held in *Goerg v. Parungao (In re Goerg)*, 844 F.2d 1562, 1565 (11th Cir. 1988):

> Care should be taken not to confuse the question of the breadth of Congress' bankruptcy power with the so-called "probate exception" to statutory diversity jurisdiction. That exception related only to 28 U.S.C. § 1332 (1982), and has

[6] The opinion below erroneously asserts that this Court twice has held that the probate exception applies to federal question cases. App. at 26. It has not. In *Harris v. Zion's Savings Bank & Trust Co.*, 317 U.S. 447 (1943), the only question before the Court was one of statutory construction – whether Congress intended to confer powers on an estate administrator that state law expressly forbade. The Court referred to the limitation on federal probate jurisdiction in construing the relevant statute, but it did not hold that the federal courts lacked jurisdiction under the probate exception. *Id.* at 450-52. Indeed, had it so concluded, it would have dismissed for want of jurisdiction and, thus, it would not have had occasion to reach the statutory question. *Markham v. Allen* also did not address this issue because it had no reason to do so; although *Markham* concerned issues of federal law, this Court held that the probate exception did not apply for other reasons, and therefore had no occasion to discuss whether the probate exception applies to federal question cases generally.

no bearing on federal question jurisdiction, the jurisdiction invoked in bankruptcy cases.[7]

The present opinion "specifically reject[s]" the Eleventh Circuit's analysis, holding that the probate exception applies to federal question cases, including bankruptcy cases. App. at 26.[8] The Court offers no real doctrinal explanation for its conclusion, stating only that the "'evil'" of "federal interference with state probate proceedings" "is as relevant to federal question cases as it is to diversity ones." *Id.*[9]

[7] Contrary to the Ninth Circuit's characterization, App. at 25, the quoted language in *Goerg* is not *dicta*. The issue there was whether a bankruptcy court had the power to grant a foreign trustee's petition for ancillary administration. The Eleventh Circuit held that the bankruptcy court had such power – a conclusion it could not reach without first concluding that federal jurisdiction was not ousted by the probate exception. *Goerg*, 844 F.2d at 1564-68.

[8] The district courts are similarly split. *See, e.g., Community Ins. Co. v. Rowe*, 85 F. Supp. 2d 800, 806 (S.D. Ohio 1999) (probate exception did not apply to ERISA claim because it "has been applied only in the context of diversity jurisdiction"); *Williams v. Adkinson*, 792 F. Supp. 755, 761 n.9 (M.D. Ala. 1992) ("Where, as here, the plaintiff does not predicate federal jurisdiction on diversity among the parties, the probate exception is not relevant."); *Powell v. American Bank & Trust Co.*, 640 F. Supp. 1568, 1574-75 (N.D. Ind. 1986) ("probate exception applies to diversity jurisdiction; there is nothing to suggest that a federal court cannot take jurisdiction over a federal question raised by a plaintiff"); *but see In re Estate of Threefoot*, 316 F. Supp. 2d 636, 642 (W.D. Tenn. 2004) ("probate exception is not limited to diversity cases"); *In re Estate of Lewis*, 128 F. Supp. 2d 573, 574 & n.3 (N.D. Ill. 2001) (same).

[9] The Eighth Circuit Bankruptcy Appellate Panel has also recently applied the probate exception to a bankruptcy matter, similarly without any analysis of why the probate exception applies in a non-diversity context. *Litzinger v. Estate of Litzinger (In re Litzinger)*, 322 B.R. 108 (B.A.P. 8th Cir. 2005).

C. This Court Should Clarify The Scope Of The Probate Exception.

Only this Court can resolve the conflicts among the circuits and authoritatively explicate the scope of the probate limitation on federal jurisdiction. Without such clarification, parties and courts will continue, as here, to spend years litigating the merits of such matters, only to learn at the end of the appellate process that the lower court never had jurisdiction to act.[10]

III. THE NINTH CIRCUIT'S EXPANSIVE INTERPRETATION OF THE PROBATE EXCEPTION PERMITS AN UNWARRANTED AND UNBOUNDED INTRUSION ON FEDERAL JURISDICTION THAT HAS NO STATUTORY BASIS.

A. The Ninth Circuit's Approach Is Unmoored To The Congressional Grant Of Federal Jurisdiction And Contravenes The Bankruptcy Code.

As discussed above, under this Court's opinions, there is no federal jurisdiction to probate a will or administer a decedent's estate because "the equity jurisdiction *conferred*

[10] The present case illustrates how costly the absence of clear rules can be. Before being reversed by the Ninth Circuit, both the bankruptcy and the district courts carefully considered the scope of their jurisdiction and concluded that the probate exception did not apply. Thus, they twice tried the merits of petitioner's tortious interference claim and awarded multi-million dollar judgments. The two trials and appeal of that claim took over nine years to resolve and resulted in "one of the most extensive records ever produced in the Central District of California." App. at 23.

Moreover, because Vickie dismissed her tortious interference claim in Texas after prevailing in federal court, if the federal judgment is not reinstated, she could forfeit her claim entirely.

by the Judiciary Act of 1789, 1 Stat. 73, and § 24(1) of the Judicial Code . . . did not extend to probate matters." *Markham*, 326 U.S. at 494 (emphasis added). As applied by this Court, thus, the probate exception is firmly grounded in Congress's grant of jurisdiction to the federal courts – it is not a judicially-crafted exception to it.

In contrast, the Ninth Circuit's application of the probate exception neither mentions the applicable statutes nor purports to interpret them. *Nowhere* in its lengthy opinion does the Ninth Circuit cite or discuss the historical basis of the probate exception or the statutory grant of federal question jurisdiction (28 U.S.C. § 1331) to the federal courts. Nor does it discuss the statutory grant of bankruptcy jurisdiction (28 U.S.C. § 1334) or any provision of the Bankruptcy Code. To the Ninth Circuit, no such discussion is necessary because it sees the probate exception as a judicially-crafted doctrine that exists separate from any statutory source.

But such an approach co-opts power that the Constitution gives to Congress: "Only Congress may determine a lower federal court's subject-matter jurisdiction." *Kontrick v. Ryan*, 540 U.S. 443, 452 (2004) (citing U.S. Const., Art. III, § 1). While courts may interpret the statutes that grant federal jurisdiction, they may not carve out exceptions to them. The Ninth Circuit violates this tenet, effectively creating a jurisdictional exception that has no statutory foundation and, thus, no limiting principles.

The absence of limiting principles is what allows the extravagance of the Ninth Circuit's extension of the probate exception. The opinion variously (and inconsistently) places the present case within the probate exception because the case raises "questions which would ordinarily be decided by the probate court in determining the validity of the decedent's estate planning documents" (App. at 29); invites findings of fact "in direct and irreconcilable conflict with

the Texas probate court's judgment" (App. at 30); "interfere[s] with the Texas probate court proceedings" (App. at 31); is "'nothing more than a thinly veiled will contest" (*id.*); and "negated . . . the power of the Texas probate court" (App. at 32). It thus provides no real guidance in future cases and permits federal judges virtually unbounded discretion in determining whether federal jurisdiction exists.

The opinion also presents a particular threat to bankruptcy jurisdiction that does not stop at the specifics of this case. The court held here that where probate and bankruptcy courts share an interest in the same assets – the probate court, for distribution to heirs; the bankruptcy court, for distribution to creditors – the bankruptcy court must defer to the probate court's adjudication. But the plain language of the Bankruptcy Code provides otherwise. Pursuant to its constitutionally-based plenary power over bankruptcy, Congress has given federal courts exclusive jurisdiction of all cases under the Bankruptcy Code, and "original but not exclusive jurisdiction of all civil proceedings arising under [the Bankruptcy Code], or arising in or related to cases under [the Bankruptcy Code]." 28 U.S.C. § 1334 (a)-(b). Exclusive federal jurisdiction extends to "all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate." 28 U.S.C. § 1334(e). Congress has also provided for an automatic stay of other litigation affecting the bankrupt or the bankruptcy estate, 11 U.S.C. § 362; *Citizens Bank v. Strumpf*, 516 U.S. 16, 21 (1995), and it has given federal courts sitting in bankruptcy the power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of" the Bankruptcy Code, 11 U.S.C. § 105(a).

Congress has also specifically provided for continuing federal bankruptcy jurisdiction even when a party's death leads to the creation of a probate estate with an interest in

bankruptcy estate assets. For example, pursuant to express bankruptcy rule, the death of a Chapter 7 debtor "shall not abate" the bankruptcy action; "[i]n such event the estate shall be administered and the case concluded in the same manner, so far as possible, as though the [death] had not occurred." Bankr. R. 1016; *see also In re Gridley*, 131 B.R. 447, 449-51 (D.S.D. 1991). Thus, "the bankruptcy proceeding will continue in rem with respect to property of the [bankruptcy estate]," and "only property exempted from property of the [bankruptcy] estate or acquired by the debtor after the commencement of the case and not included as property of the [bankruptcy] estate will be available to the representative of the debtor's probate estate." H.R. Rep. No. 595, 95th Cong., 1st Sess. 367-68 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 82-83 (1978), *quoted in* Alan N. Resnick, et al., Collier On Bankruptcy 1016.02 & n.12 (15th ed. 2004); *In re Gridley*, 131 B.R. at 450. The Bankruptcy Code thus expressly provides for federal court jurisdiction over assets relevant to both bankruptcy and probate proceedings.

Under the Bankruptcy Code, thus, it is the *federal bankruptcy court*, not the state court, that controls the adjudication of disputes common to bankruptcy and other forums. The Ninth Circuit's approach has exactly the opposite effect: It permits only *probate courts* to exercise exclusive jurisdiction over assets common to bankruptcy and probate estates.

B. The Ninth Circuit's Approach Misunderstands Equity's Historic Role In Adjudicating Trust Matters.

The Ninth Circuit's opinion holds that although Vickie claimed interference with a trust, not a will, there was no federal jurisdiction because "[t]he probate exception

applies not only to contested wills, but also to trusts that direct a post mortem disposition of the trustor's property." App. at 33.[11] This analysis fundamentally misunderstands the historic role of courts of equity in trust matters.

As noted above, this Court has traced the probate exception's origin to the Judiciary Act of 1789, which granted the lower federal courts jurisdiction over "all suits of a civil nature *at common law or in equity*. . . . " Because the probate of wills and administration of decedents' estates were thought to be ecclesiastical matters, not matters for the common law or equity courts, federal jurisdiction was held not to include them. *Id. Trusts*, however, were on an entirely different footing. "[A]t common law, the courts of equity had *exclusive* jurisdiction over virtually all actions by beneficiaries for breach of trust." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993) (emphasis added) (citing *Lessee of Smith v. McCann*, 65 U.S. 398, 407 (1861)); *Waterman*, 215 U.S. at 43 ("This court has uniformly maintained the right of Federal courts of chancery to exercise original jurisdiction . . . in favor of creditors, legatees, and heirs, to establish their claims and have a proper execution of the trust as to them."); *Payne v. Hook*, 74 U.S. at 431 ("It is . . . well settled that a court of chancery, *as an incident to its power to enforce trusts* . . . has jurisdiction to compel executors and administrators to account and distribute the assets in their hands.") (emphasis added); *see also* Peter Nicolas, *Fighting the Probate Mafia: A Dissection of the Probate Exception to Federal*

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[11] Other courts have similarly held. *See, e.g., Storm v. Storm*, 328 F.3d at 947 (probate exception applies "despite this being a dispute over the terms of an *inter vivos* trust rather than a traditional will"); *Golden v. Golden*, 382 F.3d at 359 (probate exception applies to "trusts that act as 'will substitutes' "); *Sianis v. Jensen*, 294 F.3d at 999 ("Other courts, including our own, have recognized that there might be instances when the probate exception applies in diversity actions involving trusts").

Court Jurisdiction, 74 S. Cal. L. Rev. at 1513-14 & n.202, 203 ("In eighteenth century England, the entire system of trust was within the exclusive jurisdiction of chancery, and chancery would thus never refuse to adjudicate matters relating to trusts."); F.W. Maitland, Equity 23 (1932) ("Of all the exploits of Equity the largest and most important is the invention and development of the Trust.").

In the present case, Vickie's action was for interference with an *inter vivos trust*, not a will. Her claim, thus, was within the historic equity jurisdiction of the federal courts, and it should not have been held excluded by the probate exception.

C. The Ninth Circuit's Approach Fundamentally Misconstrues *Markham*'s "Interference" Analysis.

A significant concern driving the Ninth Circuit's probate exception analysis is avoiding "'[t]he evil . . . [of] federal interference with state probate proceedings.'" App. at 26; *see also* App. at 31 ("it is clear that the exercise of federal jurisdiction would and, in this case, did *interfere* with the Texas probate court proceedings"). According to the opinion, impermissible interference occurs when a federal court adjudicates issues that "would ordinarily be decided by a probate court in determining the validity of the decedent's estate planning instrument." Thus, in the Ninth Circuit's analysis, the probate exception is invoked – and hence federal jurisdiction eviscerated – when a federal court is asked to adjudicate an issue over which a probate court also has jurisdiction.

The ostensible root of the Ninth Circuit's "interference" analysis is *Markham v. Allen*, in which this Court held that a federal court may entertain a suit "'in favor of creditors, legatees and heirs'" as long as it does not "interfere" with the probate proceedings. 326 U.S. at 494. The

"interference" *Markham* cautioned against, however, expressly was *not* federal adjudication of an issue pending before a probate court. To the contrary, *Markham* held that a federal court *may* adjudicate an issue common to state and federal proceedings, even where a federal judgment will bind the state court. *Id.* (federal court may "adjudicate rights in [decedent's] property where the final judgment does not undertake to interfere with the state court's possession *save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court*") (emphasis added). Thus, while the Ninth Circuit's opinion adopts the language of *Markham*, its analysis is fundamentally inconsistent with it.

D. The Ninth Circuit's Approach Rejects The Well-Established Concept Of Parallel State And Federal Jurisdiction And Improperly Imports Preclusion Principles Into Its Jurisdictional Analysis.

The Ninth Circuit also held that there is improper interference with a probate proceeding – and hence no federal jurisdiction – if a probate claimant is given "a second chance to litigate her claim against the estate," thus "negat[ing] . . . the power of the . . . probate court." App. at 29, 32-33. By so holding, the Ninth Circuit made the very same error – improperly eschewing federal jurisdiction by conflating *res judicata* and jurisdiction – that this Court recently disapproved in *Exxon Mobil Corp. v. Saudi Basic Indus., Corp.*, 544 U.S. __, 125 S. Ct. 1517 (2005).

In *Exxon*, the Court rejected an approach to the *Rooker-Feldman* doctrine that held that where the same issues are concurrently before state and federal courts, federal jurisdiction terminates upon entry of a state court judgment. The Court explained that while "[c]omity or

abstention doctrines may, in various circumstances, permit or require the federal court to stay or dismiss the federal action in favor of the state-court litigation," properly invoked concurrent jurisdiction does not "vanish[] if a state court reaches judgment on the same or related question while the case remains *sub judice* in a federal court." *Id.* at 1527. The Court explained:

> Disposition of the federal action, once the state-court adjudication is complete, would be governed by preclusion law. . . . *Preclusion, of course, is not a jurisdictional matter*. In parallel litigation, a federal court may be bound to recognize the claim – and issue – preclusive effects of a state court judgment, but federal jurisdiction over an action does not terminate automatically on the entry of judgment in the state court.

Id. (emphasis added) (citation omitted).

The Court emphasized, moreover, that the federal statutory scheme permits concurrent state and federal adjudication of claims and, thus, that "'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.'" *Id.* at 1526-27 (quoting *McClellan v. Carland*, 217 U.S. 268, 282 (1910)).[12] Accordingly, the Court cautioned against an expansion of *Rooker-Feldman* that would "overrid[e] Congress' conferral of federal-court jurisdiction concurrent with jurisdiction exercised by state courts." *Id.* at 1521.

A similar analysis should govern in the present context. Contrary to what the Ninth Circuit held, because a pending state court action "'is no bar to proceedings concerning the same matter in the Federal court,'" *id.* at

[12] Significantly, *McClellan v. Carland* is a probate exception case, in which this Court held that federal jurisdiction was properly exercised over a probate-related matter.

1526-27, the fact that an issue before the federal court could be decided by a state probate court should be irrelevant if federal jurisdiction is otherwise proper. A prior state court judgment also should be irrelevant to the jurisdictional analysis; while a prior judgment may have preclusive effect, federal jurisdiction nonetheless exists because "[p]reclusion . . . is not a jurisdictional matter." *Id.* at 1527.

E. The Ninth Circuit's Approach Improperly Imports State Law Into Its Jurisdictional Analysis.

Under the second prong of the Ninth Circuit's hybrid test, there is no federal jurisdiction if "[the] state's trial courts of general jurisdiction do not have jurisdiction to hear probate matters." App. at 34. This approach runs counter to this Court's repeated admonition that because federal jurisdiction is created by federal statute, it is unaffected by state law.[13] According to *Payne v. Hook*, 74 U.S. 425, 430 (1868):

> We have repeatedly held "that the jurisdiction of the courts of the United States over controversies between citizens of different States, cannot be impaired by the laws of the States, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power."

The Court similarly held in *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33, 43 (1909) (emphasis added):

[13] The error was compounded in this case because the Ninth Circuit did not independently analyze Texas law, but instead held, without doing a preclusion analysis, that it was bound by the probate court's erroneous conclusion that it had exclusive jurisdiction over Vickie's claim. App. at 34; *compare* App. at 165-70.

> [I]nasmuch as the jurisdiction of the courts of the United States is derived from the Federal Constitution and statutes, that in so far as controversies between citizens of different States arise which are within the established equity jurisdiction of the Federal courts . . . the jurisdiction may be exercised, *and is not subject to limitations or restraint by state legislation establishing courts of probate and giving them jurisdiction over similar matters.*

See also Hayes v. Pratt, 147 U.S. 557, 570 (1893) (state probate statutes cannot "defeat or impair the general equity jurisdiction of the Circuit Court of the United States to administer, as between citizens of different states, the assets of a deceased person within its jurisdiction"); *Green's Adm'x v. Creighton*, 64 U.S. 90, 107-08 (1860) ("a foreign creditor may establish his debt in the courts of the United States against the representatives of a decedent, notwithstanding the local laws relative to the administration and settlement of insolvent estates").

Accordingly, the Ninth Circuit erred in making federal jurisdiction depend on whether a probate court determines that it has exclusive jurisdiction over a petitioner's claim under state law.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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392 F.3d 1118

United States Court of Appeals,
Ninth Circuit.

In re: Vickie Lynn MARSHALL, Debtor.
E. Pierce Marshall,
Plaintiff-Counter-Defendant/
Appellant-Cross-Appellee,
v.
Vickie Lynn Marshall,
Defendant-Counter-Claimant/
Appellee-Cross-Appellant.
Nos. 02-56002, 02-56067.

Argued and Submitted Oct. 9, 2003.
Filed Dec. 30, 2004.

G. Eric Brunstad, Jr., Bingham McCutchen, Hartford, CT, for the plaintiff-counter-defendant/appellant-cross-appellee.

Sheila S. Kato and Kent L. Richland, Greines, Martin, Stein & Richland, Los Angeles, CA, for the defendant-counter-claimant/appellee-cross-appellant.

Appeal from the United States District Court for the Central District of California; David O. Carter, District Judge, Presiding. D.C. No. CV-01-00097-DOC.

Before: BEEZER, KLEINFELD, and PAEZ, Circuit Judges.

BEEZER, Circuit Judge.

This appeal involves disputed claims made by Vickie Lynn Marshall, the surviving spouse of J. Howard Marshall II, against E. Pierce Marshall, the decedent's surviving son, the trustee of decedent's trust property and the executor of the estate of J. Howard Marshall II, deceased.

The surviving spouse alleges that E. Pierce Marshall tortiously interfered with an expected inter vivos gift from the decedent. Three courts – the Texas probate court, the U.S. bankruptcy court and the U.S. district court – have rendered conflicting judgments that decide the claims of the surviving spouse and that affect the distribution of the net property of the decedent's trust and probate estate.

While active probate proceedings were pending in the courts of the State of Texas, the surviving spouse filed personal bankruptcy proceedings in California. The resulting bankruptcy court proceedings and subsequent appeals to the district court resulted in the district court awarding a money judgment to Vickie Lynn Marshall for intentional interference with an inter vivos gift that she expected from the decedent. E. Pierce Marshall filed a timely appeal from the district court's money judgment. In a cross-appeal the surviving spouse seeks to reverse the district court's determination that the bankruptcy proceeding was not a core proceeding. She also attacks the amount of the damage award entered by the district court, which reduced the sum she was awarded by the bankruptcy court.

Our jurisdiction on the merits depends upon whether the probate exception to federal court jurisdiction applies to the claims initiated in the Texas probate court between the contesting claimants to the decedent's property. Incidentally we are required to determine whether the probate exception applies in a bankruptcy case.

We have appellate jurisdiction. 28 U.S.C. § 1291. We hold that all federal courts, including bankruptcy courts, are bound by the probate exception to federal court jurisdiction and that we are required to refrain from deciding

state law probate matters, no matter how the issue is framed by the parties. We vacate the district court's final judgment and remand with instructions.

I

During his lifetime and commencing in 1982, J. Howard Marshall II conveyed and transferred most of his property under the terms and provisions of a written revocable inter vivos trust. When J. Howard Marshall II created the trust, he resided in Texas. E. Pierce Marshall and J. Howard Marshall II were initially named as co-trustees of the 1982 trust. The trust instrument expressly provided for the disposition of J. Howard Marshall II's trust property upon his death. During his lifetime, J. Howard Marshall II retained the right to receive income from the trust estate, and the trust assumed the obligation to pay the debts of J. Howard Marshall II.

In addition to property and income held in trust, J. Howard Marshall II received income and held property solely in his own name. The second wife of J. Howard Marshall II died in 1991. E. Pierce Marshall then became the primary beneficiary of the trust upon the death of J. Howard Marshall II. To a lesser extent various charities and family beneficiaries received minor trust distributions upon the death of J. Howard Marshall II.

J. Howard Marshall II met Vickie Lynn Smith in 1991. They were married on June 27, 1994. J. Howard Marshall II gave Vickie Lynn Marshall numerous inter vivos gifts of cash and personal property during his lifetime. J. Howard Marshall II did not execute any written trust, trust modification, last will and testament or conveyance in which Vickie Lynn Marshall is identified as a

legatee, devisee or beneficiary, with one exception. In 1994, J. Howard Marshall II conveyed certain particularly described real property as a gift to Vickie Lynn Marshall in a separate conveyance. There is no evidence that J. Howard Marshall II authorized Vickie Lynn Marshall to participate in any capacity whatsoever with respect to Marshall business interests. There is also no evidence in the record that Vickie Lynn Marshall was a registered owner of any securities issued by Marshall corporations engaged in the petroleum industry.

J. Howard Marshall II frequently consulted his attorneys about gift taxes, estate taxes, and trust and estate matters. He considered and rejected several suggestions made by his attorneys regarding estate plans and the transfer of property to Vickie Lynn Marshall. One of J. Howard Marshall II's tax and estate attorneys drafted a letter to another of J. Howard Marshall II's attorneys with several ideas regarding provisions for Vickie Lynn Marshall. Specifically, the correspondence recommended the creation of a "catch-all" trust for the benefit of Vickie Lynn Marshall. This letter was the source of her claim that J. Howard Marshall II intended to give her an inter vivos or post mortem gift. Although it is disputed whether this proposed catch-all trust was ever created, it is admitted that J. Howard Marshall II never delivered any property in trust for the use and benefit of Vickie Lynn Marshall. No such signed trust instrument was ever produced for admission in evidence.

J. Howard Marshall II executed his last will and testament on December 22, 1992. This will contained pour-over provisions, which required the distribution of the decedent's probate property to the trustee of the 1982 trust.

The terms of the 1982 trust were modified for the last time on July 13, 1994. Although J. Howard Marshall II was married to Vickie Lynn Marshall, no provision for distributions of income or principal of the trust estate was made in favor of the settlor's spouse. The trust remained responsible for J. Howard Marshall II's debts and permitted him to borrow money using the trust's property as security.

It is contended by E. Pierce Marshall that J. Howard Marshall II made the trust provisions irrevocable as of July 13, 1994, subject to the limited power to make specified changes, such as adding a charity as a beneficiary or substituting one beneficiary for another, as long as the beneficiary that was being substituted was already a current beneficiary. After the amendment, J. Howard Marshall II could have eliminated his son, E. Pierce Marshall, as a beneficiary of the trust by substituting a charity in his place. J. Howard Marshall II could not, however, have added Vickie Lynn Marshall as a beneficiary because she was not a named beneficiary of the trust as of July 13, 1994.

The parties vigorously contested whether J. Howard Marshall II voluntarily altered his trust so it would be irrevocable, or whether E. Pierce Marshall altered the trust without his father's knowledge. Vickie Lynn Marshall placed in issue the question whether J. Howard Marshall II possessed the mental capacity requisite to make any change to the terms of the trust. Our review of the trial records in the Texas probate court and in the United States district court discloses conflicting findings of fact critical to the merits of the cases of the contesting parties. The Texas probate court found that J. Howard Marshall II's 1982 trust, as amended, and his last will and

testament were valid and had not been forged or altered; J. Howard Marshall II had the requisite mental capacity when he executed the 1982 trust, as amended, and his last will and testament; J. Howard Marshall II had not been the victim of fraud or undue influence; J. Howard Marshall II did not have an agreement with Vickie Lynn Marshall that he would give her one-half of all of his property; and J. Howard Marshall II did not intend to give and did not give Vickie Lynn Marshall a gift from his 1982 trust, as amended, or a bequest in his last will and testament. The United States district court made findings that E. Pierce Marshall, in concert with an attorney, "backdated documents, altered documents, destroyed documents, suborned falsified notary statements, presented documents to J. Howard [Marshall II] under false pretenses, and committed perjury," all in an effort to prevent J. Howard Marshall II from giving a gift to Vickie Lynn Marshall. The United States district court also determined that E. Pierce Marshall had tortiously interfered with Vickie Lynn Marshall's expectancy of an inter vivos gift from the decedent. The district court concluded that such conduct was actionable under Texas law.

On September 29, 1994, J. Howard Marshall II delivered gifts to Vickie Lynn Marshall valued at approximately $6 million "in consideration of her marriage to me." These gifts were memorialized in a document called the "Act of Donation." They included Compagnie Victoire,[1] jewelry, title to a ranch property located in Texas, and a Mercedes Benz automobile. Vickie Lynn Marshall accepted these gifts on October 27, 1994. These gifts are all undisputed and Vickie

[1] J. Howard Marshall II created Compagnie Victoire as a vehicle to invest in Vickie Lynn Marshall's career as a model.

Lynn Marshall does not contend that J. Howard Marshall II lacked the mental capacity to make these itemized gifts.[2]

J. Howard Marshall II died of heart failure on August 4, 1995, at the age of ninety.

II

The claims of Vickie Lynn Marshall that we consider in this appeal involve gifts, trusts, and probate matters. It is undisputed that Texas law governs the 1982 trust, as amended, and the last will and testament of J. Howard Marshall II. During the course of this opinion we accept as Texas law several principles.

In Texas, to establish a right to an inter vivos gift, a plaintiff must prove "(1) [donor's] intent to make a gift; (2) [donor's] delivery of the property; and (3) [donee's] acceptance of the property." *Dorman v. Arnold*, 932 S.W.2d 225, 227 (Tex.App.1996). Mere intent of donor or donee is not enough. *See Oadra v. Stegall*, 871 S.W.2d 882, 890 (Tex.App.1994). Additionally, under Texas law, inter vivos gifts are not valid if they are meant to take effect only upon the donor's death, unless there is a valid deathbed transfer. *Dorman*, 932 S.W.2d at 227-29. The Texas probate courts are wary of allegations of an inter vivos gift where the claim is made after the purported donor's death.

[2] When referring to the question whether J. Howard Marshall II intended to give Vickie Lynn Marshall a gift, we are referring to Vickie Lynn Marshall's allegation that J. Howard Marshall II intended to give her a further gift during his life in the form of a catch-all trust worth at least half the increase in value of all his property, if not half of all his property.

"He who attempts to establish title to property through a gift inter vivos, as against the estate of a decedent, takes upon himself a heavy burden, which he must support by evidence of clear and probative force, which clearly establishes every element of a valid gift." *Id.* at 228.

Under Texas law a trust may be created by:

> (1) a property owner's declaration that the owner holds the property as trustee for another person;
>
> (2) a property owner's inter vivos transfer of the property to another person as trustee for the transferor or a third person;
>
> (3) a property owner's testamentary transfer to another person as trustee for a third person;
>
> (4) an appointment under a power of appointment to another person as trustee for the donee of the power or for a third person; or
>
> (5) a promise to another person whose rights under the promise are to be held in trust for a third person.

Tex. Prop. Code § 112.001. "There exist no particular forms or words required to create a trust, if there exists reasonable certainty as to a putative trust's property, object and beneficiaries." *Tomlinson v. Tomlinson*, 960 S.W.2d 337, 338 (Tex.App.1997). Texas courts look to the settlor's intent to determine whether a trust was created.[3]

[3] Texas law also mandates that

> [a] trust in either real or personal property is enforceable only if there is written evidence of the trust's terms bearing the signature of the settlor or the settlor's authorized agent. A trust consisting of personal property, however, is enforceable if

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Barrientos v. Nava, 94 S.W.3d 270, 280 (Tex.App.2002) (citing Tex. Prop. Code § 112.002).

Texas courts have consistently refused to allow a litigant to sue in tort for interference with the expectancy of an inheritance where the decedent's will is upheld in probate court. *See Thompson v. Deloitte & Touche*, 902 S.W.2d 13, 16 (Tex.App.1995); *Neill v. Yett*, 746 S.W.2d 32, 35 (Tex.App.1988). Under Texas law, "the facts involved and the relief requested are determinative as opposed to the label by which the claim is called. Simply put, the substance of what is pled controls, not the label or name appended to the claim." *Tri-State Chems., Inc. v. Western Organics, Inc.*, 83 S.W.3d 189, 194 (Tex.App.2002).

III

The route followed by the parties to this appeal on their epic journey is a tortuous one indeed. To facilitate an understanding of the voluminous record before us and to recognize the conflicting judgments which have been entered to date, we detail the history of the prior proceedings in state and federal courts.

> created by: (1) a transfer of the trust property to a trustee who is neither settlor nor beneficiary if the transferor expresses simultaneously with or prior to the transfer the intention to create a trust; or (2) a declaration in writing by the owner of property that the owner holds the property as trustee for another person or for the owner and another person as a beneficiary.

TEX. PROP. CODE § 112.004.

A

In April 1995, before the death of J. Howard Marshall II, an action was commenced in the probate court of Texas. Vickie Lynn Marshall sued E. Pierce Marshall in his individual capacity and in his capacities as the co-trustee of J. Howard Marshall II's Living Trust, as the agent for J. Howard Marshall II under a Power of Attorney dated July 13, 1994, and as the Temporary Guardian of the Person of J. Howard Marshall II. Vickie Lynn Marshall alleged that E. Pierce Marshall was tortiously interfering with her statutory right to support from her husband and that E. Pierce Marshall had breached his fiduciary duties as a Trustee. She also sought a declaration concerning the ownership of the assets in the Living Trust and challenged the validity of the Living Trust, claiming E. Pierce Marshall procured its execution by fraud and undue influence upon J. Howard Marshall II.[4]

Vickie Lynn Marshall alleged that E. Pierce Marshall in his individual capacity tortiously interfered with her statutory right to support from her husband and that E. Pierce Marshall had breached his fiduciary duties as a trustee of the 1982 trust agreement, as amended. Vickie Lynn Marshall sought a declaratory judgment establishing her interest in the property in the 1982 trust. She challenged the validity of the 1982 trust, as amended, alleging that E. Pierce Marshall procured its execution by fraud and undue influence upon J. Howard Marshall II. Three days after J. Howard Marshall II's death, Vickie Lynn

[4] There were also proceedings in Louisiana state court, which are not at issue here. *See In re Howard Marshall Charitable Remainder Annuity Trust*, 709 So.2d 662 (La.1998).

Marshall filed a petition in the Texas probate court to establish that J. Howard Marshall II died intestate.

E. Pierce Marshall opposed the surviving spouse's petition and offered J. Howard Marshall II's last will and testament for probate on August 16, 1995. E. Pierce Marshall filed a counterclaim in which he sought a declaration that both his father's last will and testament and his father's 1982 trust, as amended, were legally valid instruments.

Vickie Lynn Marshall then contested the validity of her husband's last will and testament and sought a declaration that his 1982 trust, as amended, was null and void. Several other parties joined the proceedings seeking a share of the estate. These parties include J. Howard Marshall III, the other son of the decedent. None of these intervening parties have joined in these appellate proceedings.

By a third amended petition,[5] Vickie Lynn Marshall alleged that E. Pierce Marshall, his attorneys, and others tortiously interfered with her expectation based upon her belief that J. Howard Marshall II had promised to give her gifts both inter vivos and post mortem. Those promises are asserted to be oral and are not supported by any written

[5] Vickie Lynn Marshall sued E. Pierce Marshall in his individual capacity, as the agent for J. Howard Marshall II under a Power of Attorney, and in his capacity as the Trustee or dominant shareholder for each of the following: the J. Howard Marshall II Living Trust; the Marshall Museum and Library of Racing; Marshall Petroleum, Inc.; Marshall Oil & Gas L.L.C.; the Marshall Grandchildren's Trust; Marshall Petroleum, Inc. Stock Holding Trust; the Betty B. Marshall Living Trust; the J. Howard Marshall II Marital Trust Number Two; and the E. Pierce Marshall Family Trust.

evidence of the specific terms upon which any specific gift is promised. Vickie Lynn Marshall again challenged the validity of the 1982 trust, as amended, and the last will and testament of the decedent.

In each of her petitions before the Texas probate court, Vickie Lynn Marshall asserted that the probate court was vested with general probate jurisdiction to hear and decide all of her asserted claims.

B

We now shift to another forum because Vickie Lynn Marshall, claiming to be a resident of the State of California, sought protections available under the bankruptcy laws of the United States.

During the pendency of the probate proceedings in the Texas probate court, Vickie Lynn Marshall filed a voluntary Chapter 11 bankruptcy petition on January 25, 1996, in the United States District Court for the Central District of California. Vickie Lynn Marshall was a debtor in possession and as such she was responsible for the payments to her creditors.

E. Pierce Marshall, in his individual capacity, filed a claim against Vickie Lynn Marshall's bankruptcy estate. He sought a declaration barring the discharge of any potential causes of action against Vickie Lynn Marshall for defamation and attorneys' fees which could be awarded by any court in the future.

Vickie Lynn Marshall, as debtor in possession of the Chapter 11 bankruptcy estate, filed counterclaims in the bankruptcy case against E. Pierce Marshall in his individual capacity for tortiously interfering with her expectancy

of a gift or bequest from J. Howard Marshall II. Specifically, the allegations included the following:

> (1) tortiously interfering with her expectancy of a gift or bequest from J. Howard Marshall II;
>
> (2) interfering with her rights as J. Howard Marshall II's surviving spouse;
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> (3) fraudulently effecting an inter vivos transfer of J. Howard Marshall II's property in trust;
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> (4) abuse of legal process;
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> (5) imprisonment of J. Howard Marshall II against his will;
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> (6) breach of contract;
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> (7) breach of fiduciary duty;
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> (8) exerting fraud, duress and undue influence over J. Howard Marshall II in the making of his last will and testament; and
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> (9) undue influence causing modification of the 1982 trust.

Only Vickie Lynn Marshall's claim for tortious interference with her expectancy of a gift actually went to trial.

E. Pierce Marshall moved to dismiss Vickie Lynn Marshall's claims for lack of subject matter jurisdiction, arguing that the Texas probate court had exclusive jurisdiction. The probate exception to federal court jurisdiction was expressly invoked in the bankruptcy court proceedings. The bankruptcy court denied E. Pierce Marshall's motion to dismiss for lack of jurisdiction.

E. Pierce Marshall then moved the district court to withdraw the litigation from the bankruptcy court. Upon

removal to district court, the Honorable William Keller initially presided. Judge Keller granted the motion, but left the bankruptcy court to resolve pending discovery disputes. In so doing, Judge Keller stated that he thought the substantive matters at issue involved the application of Texas trust and estate law and properly belonged in the Texas probate court.

On February 2, 1999, Bankruptcy Judge Samuel L. Bufford entered a sanctions order against E. Pierce Marshall for discovery abuse. The sanction imposed by the court deemed almost all facts alleged in pleadings filed by the attorneys for Vickie Lynn Marshall to be admitted facts in support of each of the pleaded legal theories upon which judgment was sought against E. Pierce Marshall.

On March 8, 1999, the bankruptcy court confirmed Vickie Lynn Marshall's Chapter 11 plan of reorganization and discharged her scheduled debts. All of the property subject to bankruptcy then reverted to Vickie Lynn Marshall in her personal capacity. This permitted Vickie Lynn Marshall to vigorously pursue all of her legal and equitable actions against E. Pierce Marshall in both the California bankruptcy court and the Texas probate court.

The district court vacated the bankruptcy court's sanctions order at a hearing on March 9, 1999, finding that the order was not supported by the evidence. Judge Keller emphasized again his view that the matter belonged in probate court. The district court vacated its prior withdrawal of the matter and returned the case to bankruptcy court.

On May 20, 1999, the bankruptcy court reentered its sanctions order with the addition of footnotes to explain its decision. In the order, the bankruptcy court once again

deemed Vickie Lynn Marshall's allegations against E. Pierce Marshall to be established. As a result of this sanctions order, E. Pierce Marshall was not allowed to present conflicting evidence at the evidentiary hearing to determine whether Vickie Lynn Marshall was entitled to damages.

The bankruptcy court held a five day hearing commencing on October 27, 1999. The court found that E. Pierce Marshall tortiously interfered with Vickie Lynn Marshall's expectancy that she would receive an inter vivos gift from J. Howard Marshall II in the form of a catch-all trust that would take effect upon the death of J. Howard Marshall II. The bankruptcy court also concluded that the Texas Supreme Court would recognize the tort of intentional interference with the expectancy of a gift if the issue were presented to it, and that the probate exception did not apply as a jurisdictional bar to Vickie Lynn Marshall's tort claim. The bankruptcy court then entered summary judgment denying E. Pierce Marshall's defamation claims against Vickie Lynn Marshall.[6]

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[6] In his complaint entitled "Complaint to Determine the Dischargeability of Debt Pursuant to 11 U.S.C. § 523(a)(6)" E. Pierce Marshall sought: "1. A determination that [E. Pierce Marshall's] claims against the Defendant have not been discharged; 2. An order granting [E. Pierce Marshall] recovery for his reasonable costs and attorney's fees incurred herein and pre- and post-judgment interest as allowed by law; and 3. An order granting [E. Pierce Marshall] such other relief as is just." Instead of adjudicating only the question whether any recovery that E. Pierce Marshall might obtain against Vickie Lynn Marshall for defamation was dischargeable, the bankruptcy court made several findings including that Vickie Lynn Marshall did not publish any defamatory statements about E. Pierce Marshall, she did not authorize her attorneys to publish defamatory statements concerning E. Pierce Marshall, she did not ratify any defamatory statements published by

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On January 18, 2000, the bankruptcy court *sua sponte* withdrew its sanctions order, but did not change any of its other rulings which had been based on the allegations by Vickie Lynn Marshall deemed true. The court did not hold another evidentiary hearing.

On September 27, 2000, the bankruptcy court made express findings that E. Pierce Marshall had tortiously interfered with Vickie Lynn Marshall's expectation that she would inherit from J. Howard Marshall II's estate. The court reasoned that a "widow's election" under Texas law supported a monetary judgment. The court awarded Vickie Lynn Marshall nearly four hundred and fifty million dollars, but stated that the final calculation of damages was contingent and could be modified upon the completion of the Texas probate action.

On October 6, 2000, the bankruptcy court entered a revised judgment against E. Pierce Marshall, individually, again for nearly four hundred and fifty million dollars, less whatever proceeds Vickie Lynn Marshall received from the estate of J. Howard Marshall II. In its revised judgment the bankruptcy court awarded damages based, not on Vickie Lynn Marshall's "widow's election," but rather as sanctions for discovery abuse by E. Pierce Marshall during the adversary proceeding.

Despite the earlier withdrawal of its sanctions order, the court stated that it made the following findings as sanctions for discovery abuse:

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her attorneys, and she did not owe any debt to E. Pierce Marshall because she was not vicariously liable for any alleged defamatory statements published by her attorneys.

> (1) E. Pierce Marshall interfered with gifts J. Howard Marshall II wished to make to Vickie Lynn Marshall by firing one attorney and conspiring with another to prevent the transfer of property from the trust;
>
> (2) E. Pierce Marshall devised a secret plan to make J. Howard Marshall II's trust irrevocable; and
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> (3) E. Pierce Marshall added the clause to the 1982 trust making it irrevocable after J. Howard Marshall II died.

The bankruptcy court found that Vickie Lynn Marshall had an expectancy of a gift based upon J. Howard Marshall II's promises to her and his instructions to his attorneys to prepare a "catch-all" trust for her that would entitle her to one-half of the future appreciation of his interest in his Marshall Petroleum, Inc. stock.

On November 21, 2000, the bankruptcy court entered a further order for punitive damages against E. Pierce Marshall, individually, in the sum of twenty-five million dollars. These damages were imposed for discovery abuses. In this order, the bankruptcy court held that the claim of Vickie Lynn Marshall was a "core" bankruptcy proceeding.

On December 29, 2000, the bankruptcy court entered its final judgment against E. Pierce Marshall individually in the amount of $474,754,134.

C

During the bankruptcy court proceedings, litigation continued in the Texas probate court. On January 5, 2001, shortly after the bankruptcy court entered its judgment,

Vickie Lynn Marshall filed a nonsuit with respect to all her pending claims in the Texas probate proceeding. The Texas probate judge expressly explained that, by reason of the filing and granting of a nonsuit, all of Vickie Lynn Marshall's claims against the decedent's estate would be forfeited. In open court the probate judge warned her as follows:

> Even if you take a nonsuit, which under the Rules of Civil Procedure give you a right to refile it, as a practical matter you don't, because the Estate is gone. . . . *Your claim to anything that the Decedent had at any time in his life is over when this final judgment is signed.* The fact that the Rules of Civil Procedure allow you to take a nonsuit and re-file later doesn't really apply in Probate Court when we're talking about who is entitled to an Estate.

Despite the probate court's warnings, Vickie Lynn Marshall freely elected to dismiss her claims against the estate of J. Howard Marshall II and against E. Pierce Marshall, individually and in his representative capacities. However, the non-suit did not dismiss Vickie Lynn Marshall as a defendant in the declaratory judgment action seeking to establish that the 1982 trust, as amended, and the decedent's last will and testament were valid.

On February 9, 2001, E. Pierce Marshall filed an amended counterclaim against Vickie Lynn Marshall and others having any interest in the estate for declaratory relief to determine their rights against the estate of J. Howard Marshall II.

The Texas probate court conducted a jury trial that lasted more than five months, in which all parties fully participated. Vickie Lynn Marshall and J. Howard Marshall

III contested the validity of every estate planning transaction from 1979 forward which involved J. Howard Marshall II or any interest in his property. Specific testimony recounted the many transfers of property in trust by J. Howard Marshall II and from the trust to E. Pierce Marshall.

Vickie Lynn Marshall presented her entire case in chief, including six days of her own testimony and a lengthy cross-examination of E. Pierce Marshall.[7] Vickie Lynn Marshall testified extensively regarding her expectancy of a gift, including her allegation that J. Howard Marshall II promised her one-half of all his property.[8] Vickie Lynn Marshall claimed in the Texas probate proceeding that E. Pierce Marshall had destroyed relevant documents, including those relating to the catch-all trust for the benefit of Vickie Lynn Marshall.

The jury in the Texas probate court returned a unanimous verdict on March 7, 2001. Consistent with the jury's verdict, the Texas probate court entered a final judgment dated December 7, 2001, which included the following provisions:

> (1) the 1982 trust, as amended, and last will and testament of J. Howard Marshall II were valid and had not been forged or altered;
>
> (2) J. Howard Marshall II had not been the victim of fraud or undue influence;

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[7] In opening statement, Vickie Lynn Marshall's counsel told the jury that "[t]his case is about tortious interference with an intent to give an inter vivos gift."

[8] This testimony apparently did not provoke the invocation of the Texas Deadman's Statute. *See* Tex.R. Evid. 601(b).

(3) J. Howard Marshall II possessed the requisite mental capacity when he executed the 1982 trust, as amended, and his last will and testament;

(4) J. Howard Marshall II did not intend to give and did not give Vickie Lynn Marshall a gift or bequest from the Estate of J. Howard Marshall II or from the 1982 trust, as amended, either prior to or upon his death;

(5) Vickie Lynn Marshall was not entitled to any distribution from the Estate of J. Howard Marshall II by virtue of an agreement;

(6) Vickie Lynn Marshall was entitled to take nothing against any of the defendants;

(7) E. Pierce Marshall was entitled to his distribution as set forth in the 1982 trust, as amended, and as provided in the last will and testament of J. Howard Marshall II;

(8) E. Pierce Marshall was entitled to a judgment for $541,000 as attorney's fees payable by Vickie Lynn Marshall for her conduct after the time of her bankruptcy discharge through the end of the Texas trial;[9]

(9) the claims of Vickie Lynn Marshall against E. Pierce Marshall were compulsory counterclaims that were required to be brought in the probate suit;

[9] On February 26, 2002, the bankruptcy court found that the Texas court's award of attorney's fees violated the bankruptcy discharge. The district court affirmed this order on August 15, 2002. This ruling is the subject of appeal No. 02-56603 and is addressed in a separate disposition.

(10) Vickie Lynn Marshall voluntarily abandoned her claims to any interest in the property, the 1982 trust, as amended, or the estate of J. Howard Marshall II; and

(11) all claims by Vickie Lynn Marshall against E. Pierce Marshall, both individually and in his various representative capacities, were dismissed.

The Texas probate court declared as a matter of law that it had exclusive and dominant jurisdiction over all claims arising out of the last will and testament, the 1982 trust, as amended, and all property interests of J. Howard Marshall II. In addition, the Texas probate court asserted exclusive jurisdiction over all affirmative claims brought and all compulsory counterclaims that could have been brought by either J. Howard Marshall III or Vickie Lynn Marshall, as well as all claims regarding any completed gift made by J. Howard Marshall II either during his life or any gift to take effect upon his death.

D

E. Pierce Marshall appealed the bankruptcy judgment to the district court. The district court asserted original bankruptcy jurisdiction. 28 U.S.C. § 1334. After the Texas probate court entered its judgment, E. Pierce Marshall moved in the district court to dismiss Vickie Lynn Marshall's claim against him, asserting that her claim was barred by both claim preclusion and issue preclusion. The motion papers argued that the matters at issue in the federal courts had been decided in the Texas probate proceeding. E. Pierce Marshall also argued that the claims of Vickie Lynn Marshall were subject to dismissal under the probate exception to federal jurisdiction.

On June 19, 2001, the district court affirmed the bankruptcy court's determination that federal jurisdiction was proper over Vickie Lynn Marshall and her several claims. The district court determined that:

> (1) the Texas probate court had not ruled on the claims of Vickie Lynn Marshall against E. Pierce Marshall in his individual capacity;
>
> (2) the probate exception to federal jurisdiction did not apply because the probate exception applied only to the probate of wills;
>
> (3) the claims of Vickie Lynn Marshall did not involve the last will and testament of J. Howard Marshall II, deceased; and
>
> (4) Vickie Lynn Marshall could have filed her complaint in a court other than a probate court in Texas and thus her claim was not a compulsory counterclaim in the probate case.

The district court then vacated the bankruptcy court's final judgment because it concluded that Vickie Lynn Marshall's claim was not a "core" bankruptcy claim, and that the bankruptcy court's judgment merely constituted proposed findings of fact and conclusions of law.

On December 21, 2001, the district court denied E. Pierce Marshall's summary judgment motion based on claim and issue preclusion. The district court then set about its own de novo review.

On March 7, 2002, the district court entered a final judgment against E. Pierce Marshall. The final judgment, which is the principal subject of this appeal, was entered in the United States District Court for the Central District of California, David O. Carter, District Judge, presiding.

The district court determined that although the Supreme Court of Texas had not yet done so, that court would recognize the tort of intentional interference with the expectancy of a gift under Texas law. The district court also determined that J. Howard Marshall II intended to give Vickie Lynn Marshall a gift in the form of a newly created trust. According to the district court, this trust was to take effect after the decedent's death. The specific trust corpus is not identified in the court's findings. We note the absence of any findings which tell us how to identify the prospective trustee and exactly how the distribution scheme for delivery of property is to work. The district court also concluded that E. Pierce Marshall tortiously interfered with J. Howard Marshall II's intentions by engaging in illegitimate "estate planning" transactions involving his father, and that E. Pierce Marshall altered the 1982 trust instrument, thereby invalidating it. The district court entered judgment in favor of Vickie Lynn Marshall which specifies an award of $88,585,534.66 for compensatory and punitive damages, plus costs of suit.

The appeal taken from the district court by E. Pierce Marshall and the cross appeal taken by Vickie Lynn Marshall have favored us with over 440 pages of appellate briefs prepared by their attorneys and they have required us to review one of the most extensive records ever produced in the Central District of California.

IV

Jurisdiction is a question of law which we review de novo. *United States v. Garrett*, 253 F.3d 443, 446 (9th Cir.2001). We retain jurisdiction to determine whether we

have jurisdiction. *See United States v. United Mine Workers*, 330 U.S. 258, 291, 67 S.Ct. 677, 91 L.Ed. 884 (1947).

V

E. Pierce Marshall contends that the probate exception to federal jurisdiction applies and that as a result the federal courts lack jurisdiction over the subject matter of this appeal. It is considered well established

> that since it does not pertain to the general jurisdiction of a court of equity to set aside a will or the probate thereof, or to administer upon the estates of decedents in rem, matters of this character are not within the ordinary equity jurisdiction of the federal courts; that as the authority to make wills is derived from the States, and the requirement of probate is but a regulation to make a will effective, matters of strict probate are not within the jurisdiction of courts of the United States.

Sutton v. English, 246 U.S. 199, 205, 38 S.Ct. 254, 62 L.Ed. 664 (1918). A federal court may "entertain suits in favor of creditors, legatees and heirs and other claimants against a decedent's estate to establish their claims so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in custody of the state court." *Markham v. Allen*, 326 U.S. 490, 494, 66 S.Ct. 296, 90 L.Ed. 256 (1946) (internal quotation marks omitted).

Vickie Lynn Marshall argues that we need not consider the applicability of the probate exception because it operates only where the federal court has diversity jurisdiction and not in federal question cases. She relies on the

Eleventh Circuit's decision in *Goerg v. Parungao* for the proposition that the probate exception applies only to statutory diversity jurisdiction. 844 F.2d 1562, 1565 (11th Cir.1988). In *Goerg* the court stated: "Care should be taken not to confuse the question of the breadth of Congress' bankruptcy power with the so-called 'probate exception' to statutory diversity jurisdiction. That exception relates only to 28 U.S.C. § 1332 (1982) [diversity cases], and has no bearing on federal question jurisdiction, the jurisdiction invoked in bankruptcy cases." *Id.* This language from *Goerg* appears to support the proposition that the probate exception does not apply to federal question cases; however, we believe that this statement is *dicta*. The issue on appeal in *Goerg* was "whether section 304 of the Bankruptcy Code . . . opens United States bankruptcy courts to proceedings ancillary to foreign insolvency proceedings where the entity that is the subject of the foreign proceeding qualifies for insolvency administration under foreign law, but does not fall within the Bankruptcy Code's definition of 'debtor.'" *Id.* at 1563.

Although courts commonly refer to the probate exception as "the probate exception to diversity jurisdiction," *see, e.g., Marshall v. Lauriault*, 372 F.3d 175, 181 (3d Cir.2004), no other circuit has followed the Eleventh Circuit's lead in refusing to apply the exception to federal question cases.[10] In contrast, the Sixth Circuit has applied the probate exception to a case that was brought under 42 U.S.C. § 1983. *See Tonti v. Petropoulous*, 656 F.2d 212, 215-16 (6th Cir.1981).

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[10] *Lepard v. NBD Bank*, 384 F.3d 232, 237 (6th Cir.2004), cited by E. Pierce Marshall, is a diversity case and does not shed any new light on whether the probate exception also applies to federal question cases.

More importantly, the *Goerg* rule conflicts with Supreme Court precedent. Contrary to Vickie Lynn Marshall's argument, the Supreme Court has evaluated the probate exception in federal jurisdiction cases, including bankruptcy, and in doing so the court has said nothing that limits the probate exception to diversity cases. *See, e.g., Markham v. Allen*, 326 U.S. at 493-95, 66 S.Ct. 296; *Harris v. Zion Sav. Bank & Trust Co.*, 317 U.S. 447, 450-53, 63 S.Ct. 354, 87 L.Ed. 390 (1943) ("The probate court, not the bankruptcy court, is the appropriate forum for weighing the respective benefits or detriments to those who share in the equity of the decedent's estate."). The court's statement in *Harris* that "the federal courts have no probate jurisdiction and have sedulously refrained, *even in diversity cases*, from interfering with the operations of state tribunals invested with that jurisdiction" suggests that the probate exception also encompasses federal question cases. 317 U.S. at 450, 63 S.Ct. 354 (emphasis added).

Consistent with *Harris*, this court has said that, in applying the probate exception, "[t]he evil to be avoided is federal interference with state probate proceedings." *Hilton v. Mumaw*, 522 F.2d 588, 593 (9th Cir.1975). This rationale is as relevant to federal question cases as it is to diversity ones.

We specifically reject the *Goerg* pronouncement and hold that the probate exception is applicable in bankruptcy cases. We proceed to determine whether the exception applies under the facts of this case.

We have few precedents which address the probate exception so we shall consider and borrow from the established body of case law more thoroughly developed in our

sister circuits. In particular, we adopt the framework for analysis laid out by the Second Circuit in *Moser v. Pollin*, 294 F.3d 335, 340 (2d Cir.2002), because it mirrors the explanation of the probate exception as set forth by the Supreme Court in *Markham*.[11]

In *Moser* the Second Circuit engaged in a two part inquiry to determine whether the controversy before it implicated probate matters such that the probate exception to federal jurisdiction applied. 294 F.3d at 340. The first part of the inquiry focuses on the question whether the matter is purely probate in nature, in that the federal court is being asked directly to probate a will or administer an estate. *Id.* As the *Moser* court noted "since few practitioners would be so misdirected as to seek, for example, letters testamentary or letters of administration

[11] Other circuits have considered the probate exception but justify their decisions without strict adherence to the doctrine as enunciated by the Supreme Court in *Markham*. *See, e.g., Lepard v. NBD Bank*, 384 F.3d 232, 237 (6th Cir.2004) (stating that "'[t]he standard for determining whether federal jurisdiction may be exercised is whether under state law the dispute would be cognizable only by the probate court'") (quoting *McKibben v. Chubb*, 840 F.2d 1525, 1529 (10th Cir.1988)); *Storm v. Storm*, 328 F.3d 941, 944 (7th Cir.2003) (stating that in determining whether it has jurisdiction over a particular case, a court should consider the policy goals underlying the probate exception, such as encouraging legal certainty, promoting judicial economy, avoiding unnecessary interference with the state law system, and respecting relative expertness of probate judges; also stating that courts should construe the probate exception narrowly); *Breaux v. Dilsaver*, 254 F.3d 533, 536 (5th Cir.2001) (stating that "[i]n determining whether a suit in federal court 'interferes' with state probate proceedings, this court considers whether the plaintiff's claim 'implicates the validity of the probate proceedings or whether the plaintiff is merely seeking adjudication of a claim between the parties'") (citations omitted); *Mangieri v. Mangieri*, 226 F.3d 1, 2 (1st Cir.2000) (stating that "courts tend to view the probate exception as extending to all suits 'ancillary' to the probate of a will") (citing *Georges v. Glick*, 856 F.2d 971, 973 (7th Cir.1988)).

from a federal judge," the answer to this question is almost always "No." *Id.* The second part of the inquiry focuses on whether the matter is probate related by determining whether, by exercising jurisdiction over the matter, the federal court would: (1) interfere with the probate proceedings; (2) assume general jurisdiction of the probate; or (3) assume control over property in custody of the state court.[12] *Id.* (citing *Markham*, 326 U.S. at 494, 66 S.Ct. 296). If the answer to any of these questions is yes, then the probate exception applies.

A

The probate of a last will and testament, the validity of a testamentary trust, and the administration of a decedent's estate are matters of primary concern to the several states. The record before us indicates that the district court has neither decided whether the last will and testament of J. Howard Marshall II should be admitted to probate nor whether the dispositive provisions of decedent's 1982 trust, as amended, are valid. The district court did not supervise the administration of the estate of J. Howard Marshall II, with respect to creditor's claims or death tax issues. Because this case does not involve the administration of an estate, the probate of a will, or any other purely probate matter, we will continue on to the second part of the *Moser* analysis to determine whether Vickie Lynn Marshall's counterclaim is probate related such that a federal court, under the probate exception, lacks jurisdiction over the matter.

[12] Because we answer the first two questions in the affirmative we do not reach this question in our analysis.

B

The reach of the probate exception encompasses not only direct challenges to a will or trust, but also questions which would ordinarily be decided by a probate court in determining the validity of the decedent's estate planning instrument. Such questions include fraud, undue influence upon a testator, and tortious interference with the testator's intent. *See Sutton*, 246 U.S. at 207-08, 38 S.Ct. 254 (holding that in Texas a suit that is essentially a claim to property subject to administration in an estate is not within the jurisdiction of the federal courts); *see also Turja v. Turja*, 118 F.3d 1006, 1008-10 (4th Cir.1997) (holding that the probate exception applies to claims of undue influence and lack of testamentary capacity); *Beren v. Ropfogel*, 24 F.3d 1226, 1228-29 (10th Cir.1994) (declining to hear tort claims of interference with expected inter vivos gifts or testamentary dispositions because "the state probate proceeding afforded plaintiffs an 'adequate and available' remedy in state court to contest [the] will" and "[t]he risk of inconsistent results is obvious"); *Dragan v. Miller*, 679 F.2d 712, 714-17 (7th Cir.1982) (refusing to hear a suit by a decedent's natural heirs against the beneficiaries of a will for intentional interference with the expectancy of an inheritance); *Starr v. Rupp*, 25 Ohio Misc. 224, 421 F.2d 999, 1003-07 (6th Cir.1970) (refusing to consider claims for breach of fiduciary duty that had already been rejected by the state court).

J. Howard Marshall II expressly declared that it was his intention to give, devise and bequeath all of his property to E. Pierce Marshall, family trusts, and to various charities through the provisions of his 1982 trust, as amended. Virtually all J. Howard Marshall II's property was to be conveyed post mortem to E. Pierce Marshall

under the terms of the 1982 trust, as amended, for the express uses and purposes detailed as part of the terms of the written trust. The Texas probate court, as the supervisor of estate administration, was required to sort through all claims regarding distribution of the trust corpus. As the probate judge observed, the parties appearing in Texas were there to resolve:

> the question of what [J. Howard Marshall II] had and what he did with it and whether that was proper or improper. All of that was before the Court. Howard Marshall III complained of every transaction that was done since 1979. Every transaction in connection with his estate plan was before this Court, and all of those transactions were found to be valid by the jury, and the Court is going to find them to be valid.

The district court's invalidation of the 1982 trust, as amended, was a necessary step supporting the conclusion that Vickie Lynn Marshall was entitled to a money judgment for damages. The district court specifically determined that the trust was forged and was procured by fraud in direct and irreconcilable conflict with the Texas probate court's judgment entered consistent with the findings of a jury. The district court's finding that J. Howard Marshall II intended to favor Vickie Lynn Marshall with a multi-million dollar gift, devise or bequest of property from his estate stands in direct conflict with the probate court's finding that J. Howard Marshall II did not intend to give, and did not give, Vickie Lynn Marshall any further gift either during his lifetime or post mortem.

The bankruptcy court's judgment was based specifically on Vickie Lynn Marshall's interest in J. Howard Marshall II's estate. In the bankruptcy court Vickie Lynn

Marshall's damages were fixed in a dollar sum, less whatever future sum was to be received from the Texas probate proceedings in the Estate of J. Howard Marshall II. The district court's damage award is likewise based on the theory that property that was distributed from the trust estate of J. Howard Marshall II to E. Pierce Marshall should have been distributed to Vickie Lynn Marshall instead.

Although Vickie Lynn Marshall styles her action as a tort action, it is clear that the exercise of federal jurisdiction would and, in this case, did interfere with the Texas probate court proceedings. Vickie Lynn Marshall argues that her counterclaim is a personal one against E. Pierce Marshall as an individual and not against the estate. She cites *Breaux v. Dilsaver* for the proposition that the probate exception is inapplicable to an action against an administrator of an estate in his personal capacity because the judgment would be satisfied from the defendant's own property and not from the decedent's estate. 254 F.3d 533, 536-37 (5th Cir.2001). *Breaux* did not involve a challenge to the validity of the decedent's will or the distribution of estate property. *Id.* at 537. The personal representative's performance of his duties under the will was the only matter at issue. *Id.* at 535. Here this is not the case. In her brief, Vickie Lynn Marshall argues that she is entitled to nothing either from the 1982 trust, as amended, or the estate itself. Rather, she contends that she is entitled to the amount that J. Howard Marshall II intended to give her, in the form of a separate catch-all trust, but for the improper interference by E. Pierce Marshall. Regardless of the way in which Vickie Lynn Marshall seeks to characterize her lawsuit, "it is in substance nothing more than a thinly veiled will contest." *Moser*, 294 F.3d at 340-41.

"[M]ere labels – whether an action is styled as a tort action or will contest – are not decisive in our probate-exception analysis." *Storm v. Storm*, 328 F.3d 941, 945 (7th Cir.2003). When the district court entered a judgment in favor of Vickie Lynn Marshall in the form of a damage award based upon what the court thought she should have received from J. Howard Marshall II's estate, the power of the Texas probate court was negated.

The Seventh Circuit, in a case very similar to this one, addressed some of these same issues. In *Storm v. Storm*, the grandson of the decedent filed an action seeking to obtain damages for tortious interference with an inheritance expectancy. 328 F.3d at 942. The court held that while the plaintiff

> phrases his action as one involving tortious interference with his inheritance expectancy, the practical effect of his lawsuit would be similar to that of a successful will contest: the terms of the final, allegedly invalid testamentary instruments would essentially be bypassed, while [the plaintiff] would receive, as damages, the assets he would have otherwise been entitled to under what he says are [the decedent's] actual will and trust.

Id. at 945. Here the terms, held to be valid by the Texas probate court, of J. Howard Marshall II's 1982 trust, as amended, were bypassed by the district court when it granted damages "in the amount that J. Howard intended to give her." Although Vickie Lynn Marshall couches her claims in terms of tortious interference, if we were to uphold the decision of the district court we would essentially be allowing Vickie Lynn Marshall a second chance to

litigate her claim against the estate of J. Howard Marshall II.

Vickie Lynn Marshall also contends that the probate exception is not applicable because her counterclaim concerns E. Pierce Marshall's interference with an inter vivos gift and that the gift was not a testamentary disposition. We find no support for this argument. The probate exception applies not only to contested wills, but also to trusts that direct a post mortem disposition of the trustor's property. *See Golden ex rel. Golden v. Golden*, 382 F.3d 348, 359 (3d Cir.2004) (agreeing with *Storm*, 328 F.3d at 947, that "causes of action involving trusts are treated under the probate exception in the same way as actions involving wills"). An inter vivos trust which disposes of property upon the death of the settlor is a recognized will substitute. *See Georges v. Glick*, 856 F.2d 971, 974 n. 2 (7th Cir.1988); *see also Storm*, 328 F.3d at 947.

Vickie Lynn Marshall cannot avoid the probate exception simply by stating that the trust which she claims was to be created for her benefit was an inter vivos trust. Here, the trust put into question by Vickie Lynn Marshall (the 1982 trust, as amended), not only controlled the distribution of J. Howard Marshall II's property during his lifetime, but also provided for the post mortem disposition of trust property. The trust executed by J. Howard Marshall II constituted the centerpiece of his estate plan. By declaring that the trust was invalid, the bankruptcy and district courts directly interfered with the Texas probate court's administration of the decedent's estate.

C

Where a state has relegated jurisdiction over probate matters to a special court and if that state's trial courts of general jurisdiction do not have jurisdiction to hear probate matters, then the federal courts also lack jurisdiction over probate matters. *McCan v. First Nat'l Bank of Portland*, 139 F.Supp. 224, 227 (D.Or.1954), *aff'd*, 229 F.2d 859 (9th Cir.1956). A state court's holding regarding its jurisdiction over probate matters is binding on federal courts and is immune from collateral attack under the doctrine of *res judicata*. *Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 706-07, 102 S.Ct. 1357, 71 L.Ed.2d 558 (1982); *Durfee v. Duke*, 375 U.S. 106, 111, 115-16, 84 S.Ct. 242, 11 L.Ed.2d 186 (1963).

The probate exception to federal court jurisdiction is invoked because the state probate court must have exclusive in rem jurisdiction over all claims either against or on behalf of the decedent's estate. The probate jurisdiction extends to all probate matters whether based on a theory of tax liability, debt, gift, bequest, tort, or any other theory that interferes with the probate of wills or the state court's ability to engage in the administration of estates. Such jurisdiction is necessary for a probate court to perform its function properly in determining the lawful distribution of the decedent's estate. Because probate proceedings are actions in rem, they bind all persons unless set aside in the manner provided by law. *Mooney v. Harlin*, 622 S.W.2d 83, 85 (Tex.1981). "An in rem judgment ... is binding upon the whole world and specifically upon persons who have rights or interest in the subject matter, and this is so whether those persons were or were not personally served." *Ladehoff v. Ladehoff*, 436 S.W.2d 334,

336 (Tex.1968). The probate court ruled it had exclusive jurisdiction over all of Vickie Lynn Marshall's claims against E. Pierce Marshall. That ruling was binding on the United States district court. *Durfee*, 375 U.S. at 115-16, 84 S.Ct. 242; *see also* TEX. PROB. CODE §§ 5A(b), 5(f) ("[A]ny cause of action appertaining to estates or incident to an estate shall be brought in a statutory probate court" rather than in the district court, including "all matters relating to the collection, settlement, partition, and distribution of estates of deceased persons.").[13]

Upon the death of J. Howard Marshall II, and after the publication of notice to creditors, all claims against the decedent and his estate were required to be made in the probate proceedings. The Texas probate court had exclusive jurisdiction over Vickie Lynn Marshall's claim that J. Howard Marshall II intended to give his spouse a gift because her claim went to the very essence of the testamentary instruments executed by J. Howard Marshall II in his lifetime. The Texas probate court also had exclusive jurisdiction over Vickie Lynn Marshall's claim that E. Pierce Marshall improperly engaged in a series of transactions which wrongfully depleted the trust and estate of J. Howard Marshall II. Had Vickie Lynn Marshall succeeded, the result would have been a money judgment against E. Pierce Marshall and in favor of the estate of J. Howard Marshall II. Whether a party improperly removed an asset from a decedent's estate prior to the decedent's

[13] Vickie Lynn Marshall cites another provision of the Texas Probate Code that applies to counties that are not large enough to have specialized probate courts. J. Howard Marshall II was domiciled in Harris County, where an established probate court is located. Therefore, Texas Probate Code section 5A(b) applies.

death is clearly a matter within the exclusive jurisdiction of the probate courts in Texas. *English v. Cobb*, 593 S.W.2d 674, 675-76 (Tex.1979).[14] Proof of these claims was required to be made and adjudicated in the Texas probate court having exclusive jurisdiction over such claims.

Vickie Lynn Marshall argues that because she voluntarily dismissed her claims in the Texas probate proceeding, her claims are no longer a part of that suit. We agree. The record is clear that E. Pierce Marshall did not dismiss his claims against Vickie Lynn Marshall seeking a declaration that decedent's trust and last will and testament were valid. Vickie Lynn Marshall clearly remained a party in the case. Notwithstanding the dismissal of claims by Vickie Lynn Marshall, the Texas probate court concluded that Vickie Lynn Marshall's claims were compulsory counterclaims under Texas law. *See* TEX. R. CIV. P. 97(a). Thus, Vickie Lynn Marshall was precluded from filing her claims in another court. *See Ingersoll-Rand Co. v. Valero Energy Corp.*, 997 S.W.2d 203, 207 (Tex.1999) (citing *Wyatt v. Shaw Plumbing Co.*, 760 S.W.2d 245, 247 (Tex.1988)).

D

We agree with the contention of E. Pierce Marshall that the probate exception to federal court jurisdiction applies in this case because Vickie Lynn Marshall's claims were simply a disguised attack on J. Howard Marshall II's

[14] As a general proposition, Vickie Lynn Marshall is correct that she was entitled to sue E. Pierce Marshall directly for a tort in her bankruptcy action. It is the probate exception that removes the claim from federal jurisdiction.

1982 trust, as amended, and on the postmortem disposition of his property as provided in the trust.[15]

VI

Due to our resolution of this appeal, we need not address E. Pierce Marshall's arguments concerning claim and issue preclusion, the Seventh Amendment to the U.S. Constitution, the Full Faith and Credit Clause, the *Rooker-Feldman* doctrine, the merits of the district court's judgment and interim rulings, nor whether the Texas Supreme Court would recognize the tort of tortious interference with an expected gift. We specifically withhold approval of the bankruptcy and district courts' holdings that Texas would recognize the tort of tortious interference with an expected gift.

We apply the probate exception to federal court jurisdiction and hold that all judgments awarded to Vickie Lynn Marshall against E. Pierce Marshall should be reversed. We vacate the district court judgment and remand with instructions for the district court to enter an order directing the bankruptcy court to vacate its judgment against E. Pierce Marshall individually. We direct dismissal of the claims of Vickie Lynn Marshall against E. Pierce Marshall for lack of jurisdiction.[16] We also instruct

[15] We need not reach the third question under the second part of the *Moser* analysis as we have answered the first two questions in the affirmative.

[16] E. Pierce Marshall's motion for summary reversal is denied as moot. E. Pierce Marshall's motion to certify to the Texas Supreme Court the question whether Texas recognizes a tort for intentional interference with the expectancy of a gift is denied. E. Pierce Marshall's request that we take judicial notice of the submitted papers is granted.

the district court to consider its lack of jurisdiction under the probate exception as applied to disputes between the parties with respect to procedural interim orders or sanctions awarded either in the district or bankruptcy court. The district court should also instruct the bankruptcy court to address the suggestion by Vickie Lynn Marshall's counsel that it should on remand proceed with Vickie Lynn Marshall's other causes of action. The district court should instruct the bankruptcy court that any further action by the bankruptcy court should be consistent with this opinion.

VACATED AND REMANDED.

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275 B.R. 5

United States District Court,
C.D. California.
In re Vickie Lynn MARSHALL, Debtor.
E. Pierce Marshall, Plaintiff,

v.

Vickie Lynn Marshall, Defendant.
Vickie Lynn Marshall, Counterclaimant,

v.

E. Pierce Marshall, Counter-Defendant.
No. SA CV 01-97 DOC.
Bankruptcy No. LA 96-12510 SB.
Adversary No. AD 96-1838 SB.

March 7, 2002.

Rusty Hardin, Hardin & Associates, B. Lee Ware, Don Jackson, Ware, Snow, Fogel & Jackson, Houston, TX, Robert E. Mangels, Joseph A. Eisenberg, Herbert A. Bernhard, Julia J. Rider, Jeffer, Mangels, Butler & Marmaro, Los Angeles, CA, G. Eric Brunstad, Jr., Bingham, Dana, Hartford, CT, for E. Pierce Marshall.

Philip W. Boesch, Jr., Howard Stern, Boesch Law Group, Eric Berg, Zelle, Hofmann, Voelbel & Gette, Marina Del Rey, CA, Kent Richland, Sheila S. Kato, Greines, Martin, Stein & Richland, Los Angeles, CA, for Vickie Lynn Marshall.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

CARTER, District Judge.

Before the Court is the proposed findings of fact and conclusions of law entered by the bankruptcy court in this

matter on October 6, 2000 and November 21, 2000. Beginning on June 25, 2001, this Court conducted a de novo review of the bankruptcy court's proposed findings. From December 11, 2001 to January 8, 2002, this Court conducted an evidentiary hearing wherein it accepted the testimony of the central figures in the case, documentary evidence, and arguments of counsel. After reviewing all of the evidence in this matter, the Court adopts the findings of fact and conclusions of law of the bankruptcy court, with certain amendments, and makes independent findings of fact and conclusions of law, as set forth below.

PROCEDURAL HISTORY

Defendant and Counterclaimant Vickie Lynn Marshall (Vickie)[1] is the surviving widow of J. Howard Marshall, II (J. Howard), who died on August 4, 1995. Vickie, also known as Anna Nicole Smith, is a figure of some notoriety from her career as a model. J. Howard was also a figure of some notoriety as he was said to be either the richest or second-richest man in Texas at the time of his death.

The magnitude of the sums of money involved in J. Howard's estate has sparked intensely contested litigation on several fronts. First, succession proceedings[2] took place in Louisiana, but were dismissed in 1998 after the Louisiana Supreme Court found jurisdiction lacking in that state. *See In re Howard Marshall Charitable Remainder*

[1] As all the principals in the matter at hand share the same last name, the Court will refer to the parties by their given names, as is customary in cases involving family members.

[2] Louisiana succession proceedings are similar to probate proceedings in most states.

Annuity Trust, 709 So.2d 662 (La.1998). Second, probate proceedings were commenced in Harris County, Texas. The case was tried to a jury and a verdict returned. Judgment was originally entered on August 15, 2001, with Amended Judgments entered on October 15, 2001 and December 7, 2001. Several motions for entry of an amended judgment were filed just before the judgment was to become final on January 7, 2002. On January 11, 2002, the Texas probate court denied those motions. Under Texas law, the judgment became final on February 11, 2002. On February 21, 2002, the bankruptcy court held that parts of the judgment in the Texas probate proceedings violated Vickie's discharge under the bankruptcy code, and was obtained only after J. Howard's youngest son, E. Pierce Marshall (Pierce) misrepresented to the bankruptcy court which claims he would pursue in the Texas Probate proceeding. *Marshall v. Marshall (In Re Marshall),* 273 B.R. 822 (Bankr.C.D.Cal.2002) *(Marshall V).* Third, on January 25, 1996, a few months after J. Howard's death, Vickie filed for Chapter 11 bankruptcy here in the Central District of California.[3] This bankruptcy case engendered two adversary proceedings with which this Court has had involvement.

In January 1998, Vickie filed an adversary complaint against Finley Hilliard as trustee of the J. Howard Marshall, II Living Trust and as executor of the succession of J. Howard Marshall, II. On July 22, 1998, the Honorable

[3] The bankruptcy court noted in one of its decisions that Vickie apparently filed for bankruptcy because, after not receiving an inheritance from J. Howard, she lacked money and also because a default judgment had been entered against her on claims brought by her former personal assistant or housekeeper. This claim subsequently settled.

William D. Keller issued an order withdrawing the reference to the bankruptcy court of this proceeding, which thereafter proceeded before Judge Keller. On March 10, 1999, Judge Keller stayed the proceeding, pending the outcome of either the Texas probate proceedings or the present adversary proceeding, which is the subject of this order (the Adversary Proceeding). On November 2, 1999, the proceeding was transferred to this Court. That proceeding remains stayed.

The matter currently before the Court commenced on May 7, 1996, when Pierce filed an adversary complaint seeking a determination that Vickie owed him a debt that was nondischargeable. Pierce alleged that Vickie had defamed him when, prior to the time she filed for bankruptcy and with her complicity, some of her lawyers told members of the press that Pierce had used forgery, fraud, and overreaching to gain control of J. Howard's assets.[4] On June 11, 1996, Pierce filed a proof of claim in the bankruptcy case. He made the claim by attaching a copy of the complaint from the adversary proceeding.

Vickie responded to both the adversary complaint and the proof of claim. On June 14, 1996, she answered the Adversary Proceeding complaint, asserting, in part, truth as a defense. She also asserted counterclaims for fraudulent transfer, an injunction, conversion, tortious interference, breach of fiduciary duty, abuse of process, fraud, promissory estoppel, breach of contract (third-party

[4] Debts based on "willful and malicious injury," such as intentional torts, are not dischargeable. 11 U.S.C. § 523(a)(6). Damages for libel or defamation are not dischargeable when the statements were published with knowledge of their falsity. *Wheeler v. Laudani,* 783 F.2d 610, 615 (6th Cir.1986).

beneficiary), the imposition of a constructive trust, an accounting, and indemnity and contribution. As to Pierce's proof of claim, Vickie filed an objection on July 3, 1996.

After the case had gone through significant discovery disputes, Pierce filed a motion to withdraw the reference to the bankruptcy court of the Adversary Proceeding on September 22, 1998. That motion was assigned to Judge Keller for determination. Judge Keller issued a ruling on October 21, 1998 withdrawing the reference, but retaining the services of the bankruptcy judge for discovery purposes. On March 10, 1999, Judge Keller vacated the order withdrawing the reference, effectively returning this matter to the bankruptcy court.

On November 5, 1999, the bankruptcy court granted summary judgment for Vickie on Pierce's Adversary complaint. It found that Vickie had published no statements about Pierce, had not ratified any statements about Pierce made by her attorneys, and was not otherwise vicariously liable for any statements her attorneys had made about Pierce. Thus, the bankruptcy court held that Vickie had not committed a willful or malicious act under 11 U.S.C. § 523(a)(6).

Vickie's counterclaims against Pierce went to trial in the bankruptcy court in the fall of 1999. Approximately ten months later, on September 27, 2000, the bankruptcy court issued a Memorandum of Decision Following Trial (Original Decision). The Original Decision held that Pierce tortiously interfered with Vickie's expectation of the inheritance she otherwise would have received if she had exercised her right to a widow's election. On October 6, 2000, the bankruptcy court issued an Amended Memorandum of Decision Following Trial (Amended Decision),

which superceded the Original Decision. *See Marshall v. Marshall (In re Marshall),* 253 B.R. 550 (Bankr.C.D.Cal.2000) *(Marshall I).* The Amended Decision concludes not that Pierce tortiously interfered with Vickie's expectation of an inheritance, but that he interfered with her expectation of an *inter vivos* gift. *Id.* at 553. This was based, in large part, on facts found against Pierce as sanctions for discovery abuses, in addition to the evidence at trial. The bankruptcy court awarded Vickie $449,754,134 in damages. *Id.*

Pierce again filed a motion to withdraw the reference to the bankruptcy court. *See* 28 U.S.C. § 157(d). The case was randomly assigned to this Court for determination. On November 21, 2000, just prior to argument on that motion, the bankruptcy court issued a third order. This decision, the Supplemental Memorandum of Decision Following Trial (Supplemental Decision), does not supercede the Amended Decision, but instead supplements it by explaining that the bankruptcy court had determined that Vickie's counterclaims were core proceedings and by imposing punitive damages of $25 million.

This Court heard oral argument on Pierce's motion to withdraw the reference on December 11, 2000 and then took the matter under submission. The motion was later denied in this Court's Amended Order Regarding Subject Matter Jurisdiction. *See Marshall v. Marshall (In re Marshall),* 264 B.R. 609, 618 (C.D.Cal.2001) *(Marshall III).*

On December 29, 2000, the bankruptcy court entered a final judgment in this matter. *See Marshall v. Marshall (In re Marshall),* 257 B.R. 35 (Bankr.C.D.Cal.2000) *(Marshall II).* Pierce appealed that judgment to this Court.

In April 2001, this Court issued an Order Regarding Subject Matter Jurisdiction holding that the probate exception to federal jurisdiction did not apply, and therefore this Court did have subject matter jurisdiction, but finding that the matter was a non-core, "related to" matter pursuant to 28 U.S.C. § 157(c). Accordingly, the Court deemed the bankruptcy court's Amended Decision and Supplemental Decision as proposed findings of fact and conclusions of law pursuant to 28 U.S.C. § 157(c)(1) and began to undertake a de novo review of the record submitted in this matter. Both parties requested that the Court certify the matter for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). On June 19, 2001, the Court entered an amended decision, certifying the matter for interlocutory appeal. *Marshall III,* 264 B.R. at 633. The parties filed cross-motions for leave to file an interlocutory appeal with the Ninth Circuit, which the Ninth Circuit denied.

On August 27, 2001, this Court held a status conference on the matter and set a schedule for hearing additional evidence. On October 5, 2001, this Court held a hearing on the evidentiary sanctions imposed against Pierce for discovery abuses. In a minute order of that date, the Court found that discovery abuses had taken place, but held in abeyance its decision on sanctions pending this order. In addition, the Court ordered Pierce to produce to Vickie in California several hundred boxes of documents previously withheld. On October 23, 2001, Pierce produced more than 400 boxes of documents to a document repository stipulated to by the parties in El Segundo, California.

On November 2, 2001, Pierce filed a motion to dismiss or alternatively for summary judgment based on *res judicata.* The Court heard arguments on December 11, 2001 and on December 21, 2001, denied Pierce's motion.

Marshall v. Marshall (In re Marshall), 271 B.R. 858 (C.D.Cal.2001) *(Marshall IV).*

Beginning on December 11, 2001, this Court heard evidence in the Adversary Proceeding. The Court heard live testimony from Harvey Sorensen, Edwin Hunter, Jeff Townsend, Vickie Lynn Marshall, and E. Pierce Marshall. The Court also reviewed numerous video and audio tapes, substantial documentary evidence not previously available, evidence and testimony offered by Pierce that the bankruptcy court had excluded as sanctions for Pierce's discovery abuses, and evidence adduced during the Texas probate proceedings. Additionally, the Court reviewed volumes of testimony from depositions and previous court proceedings submitted by the parties. On January 8, 2002, the Court heard argument of counsel and took the matter under submission.

SANCTIONS

A substantial portion of the findings proposed by the bankruptcy court were imposed against Pierce as sanctions for discovery abuses pursuant to Federal Rule of Bankruptcy Procedure 7037. *Marshall I,* 253 B.R. at 554 n. 5. On October 5, 2001, this Court heard argument on the matter and held in abeyance its decision, pending a further showing of discovery abuse in light of the Court's order requiring the production of documents and a showing of prejudice by Vickie. After hearing evidence, the Court is able to make a determination of this matter on the merits and therefore does not reach the issue of evidentiary sanctions under Federal Rule of Civil Procedure 37(b)(2)(A). Therefore, except to the extent set forth

in Footnote 17, the Court makes no findings on the issue of sanctions at this time.

FINDINGS OF FACT

I. THE LIFE OF J. HOWARD MARSHALL, II

J. Howard's autobiography, *Done in Oil,* harkens back to a nostalgic period in American history of allegedly self-made entrepreneurs who shaped our country. It recalls a time when the saying "go west young man" was the siren song for men and women of our country who left humble beginnings and crossed the rivers and plains to settle huge expanses of the nation. These ruggedly honest individuals walked the Oregon Trail, settled the Oklahoma territories, worked the California gold fields and inspired phrases like "Remember the Alamo," which needs no explanation to Americans. The myths and the reality of these individuals of character and vision survive and now form a large part of our country's history and folklore. J. Howard set himself in the context of these enterprising pioneers. Both parties have argued that to understand this case, the Court must understand who J. Howard was and who Vickie is. At the outset, the Court admits to being uncomfortable with testimony that delved so intimately into their private lives. However, after a thorough review of the bankruptcy court's record and the testimony heard by this Court, the parties are correct to emphasize the particular nature of the individuals involved. The Court will therefore set forth some insights into the myths and reality of J. Howard and Vickie.

A. Background

Born in 1905, J. Howard attended private schools in the northeast part of the United States, including the George School, an exclusive New England prep school, Haverford College, an elite liberal arts college, and Yale Law School, one of the nation's leading law schools, from which he graduated *magna cum laude* in 1931. Although he often derided his undergraduate liberal arts education, he took great pride in the legal training he received at Yale. Upon graduation, he worked as an associate in a New York firm for two years. Subsequently he returned to Yale Law School to teach and later became the Assistant Dean.[5]

In the 1930's, J. Howard worked for the Roosevelt Administration on the proration of oil production. During World War II he continued to work on petroleum supplies and logistics, serving on the government petroleum board.

After the War, J. Howard moved to Ashland, Kentucky and became president of Ashland Oil Company. He subsequently became Vice President of Mid-Continent and by the mid 1950's he was working for Signal Oil in California. In 1954, J. Howard was one of the founders of Great Northern Oil and Gas Company. The initial stockholders were Woodley Petroleum, Southern Production, Sylvester Dysone and J. Howard. The wealth of the Marshall family is primarily based on the interest acquired by J. Howard

[5] One of the subjects he taught at Yale was wills and trusts. Surely he did not realize at the time that these same subjects would take up large portions of his later life, and dominate his family's affairs for more than six years after his death.

in Great Northern Oil and Gas, the predecessor company to Koch Industries.

B. First Marriage

J. Howard met and married his first wife, Eleanor Pierce Marshall (Eleanor)[6] in the 1930's. Their marriage produced two children, J. Howard Marshall, III (J. Howard, III) and Pierce.

Eleanor has been described to the Court as a refined, gentile, spiritual, and religious woman. In her sixties, well after her divorce from J. Howard, Eleanor became a minister. Now ninety-seven years old, the Court was told the story that when she was being deposed in one of these related matters, she inquired of counsel how long the deposition would last, because she did not want to miss her dancing lessons later that day. Eleanor was the primary care-giver for Pierce and his older brother due to the absenteeism of J. Howard as he pursued his business ventures.

The older brother, J. Howard, III, has been described to the Court as a true scholar. He attended Cal Tech and graduated at the top of his class. J. Howard, III formed a company in Los Angeles immediately following graduation and has remained a southern California resident throughout his lifetime. J. Howard was immensely proud of J. Howard Marshall, III but disinherited him over a financial disagreement involving the buy-back of Koch stock, *see* Part I.D, *infra*.

[6] Eleanor later re-married and is now Eleanor Stevens.

Pierce attended a military academy in Indiana and Webb School in Claremont, California. Subsequently he attended Pomona College, graduating in 1961. Following graduation he worked briefly in Michigan and then served in the Navy from 1963-65. He married in 1965 and he and his wife have been married for over thirty-five years. Pierce worked in California and New York as an investment banker until he moved to Texas in 1968 at the urging of his father. J. Howard wanted Pierce to become involved in oil and gas ventures. Neither Pierce nor J. Howard Marshall, III had spent much time with their father while growing up and the significant bond between Pierce and J. Howard seems to have developed during Pierce's years in Texas working with his father. Throughout the remainder of the 1960's and 1970's Pierce and J. Howard invested together in businesses which ranged from oil and gas to restaurant ownership.

In 1961, the thirty-year marriage between Eleanor and J. Howard dissolved. J. Howard was fifty-five years old at the time of the divorce, and at that time, two trusts were created to hold J. Howard's and Eleanor's now separate property interests. Trust B was formed on behalf of Eleanor and Trust S on behalf of J. Howard. However, Eleanor left her financial affairs in the hands of her former husband because she trusted his business acumen.

C. Second Marriage

In December 1961, J. Howard married Betty Bohannon Marshall (Betty). At his father's request, Pierce served as the best man. There are no children from this marriage.

Betty and J. Howard had met in the mid-1930's. She has been described to the Court as strong, intelligent, street smart, astute in business, and a good match for J. Howard. J. Howard Marshall, III always believed that his father had a long-term relationship with Betty during his marriage to Eleanor.

In 1961, J. Howard accepted the Presidency of Union Texas and he and Betty moved to Houston. When most people are planning for retirement, J. Howard was continuing the pursuit of the business that had been the focus of his life.

J. Howard created what he referred to as a "new community" for he and Betty. Although not formalized until years later, to J. Howard, this new community always existed. It consisted of any assets that he and Betty acquired during their marriage, even if they could be traced back to his own separate property.

In the early 1980's Betty was diagnosed with Alzheimer's disease. Her condition slowly deteriorated until her death in the Fall of 1991.

D. Koch Industries and the Disinheritance of J. Howard, III

Koch Industries (Koch) is a privately held, integrated petroleum and chemical conglomerate headquartered in Wichita, Kansas. Koch is estimated to be the second largest privately held company in the United States based on revenues of approximately $35 billion dollars. Koch Industries is unique among privately held companies in that it pays out a low dividend and instead reinvests its funds in order to grow the company. To that end, Koch

Industries has been an unqualified success, growing at dramatic rates over the last two decades.

Koch's history can be traced back to Great Northern Oil and Gas company, which formed in 1954 with J. Howard owning 16%, Southern owning 40%, Woodley owning 40% and the remaining percentages owned by minority shareholders. Subsequently, Fred Koch purchased Southern's 40% interest in Great Northern. Woodley eventually sold its interest to Pure which subsequently sold to Union Oil. Union Oil then sought to take over Great Northern, and merge it into Union Oil, making it a publicly traded company. J. Howard and the Koch family prevented the takeover.

Fred Koch and J. Howard shared the same ideas about business. Their belief was that earnings should be reinvested in the company to create sustained growth. They also believed their company should be privately held. To them, the management advantages of a privately held company outweighed short-term benefits of going public and making a quick profit in the public market. They wanted to be able to make quick business decisions without being encumbered with the need for shareholder approval, which was time consuming and often divisive. They also did not want to be subject to yearly shareholder demands for high dividend returns. This private business philosophy has been steadfastly adhered to for decades.

The Koch family eventually bought out Union Oil's interest and changed the name to Koch Industries. Fred Koch chose his son Charles Koch to take over as president of Koch Industries. J. Howard promised Fred Koch that he would always support Charles Koch and support keeping

Koch Industries a privately held company. Since the late-1960's, Charles Koch has been Chairman and CEO of Koch Industries. On his death, Fred Koch left equal shares of his voting stock in Koch Industries to his four sons, Charles, David, Bill, and Fred Jr. (Freddie).

In 1974, J. Howard Marshall, III wed in Los Angeles. At the reception J. Howard gave each of his sons 4% of the voting common stock. Although legally he would have no voting rights, J. Howard believed he could still control this 8% minority voting right through J. Howard, III and Pierce. Upon giving his sons the stock, J. Howard said: "Boys, these are the Crown Jewels, take care of them."

A disagreement erupted in 1980 between the children of Fred Koch about the future of Koch Industries. Bill and Freddie Koch believed that the best approach was to go public. Charles and David Koch, however, knew that their father would want the company to stay private. A fight for control of the family business ensued.

Freddie and Bill and their allies could count 48% ownership in the company, just short of the majority that they would need to install a new board that would approve a public offering. To find the extra votes, they looked outside the family. Freddie and Bill approached Pierce, now the owner of 4% of the voting stock, and asked him to vote with them, but he declined. However, when Bill and Freddie approached J. Howard, III, he sided with them, giving them the votes needed to oust the old board, including J. Howard. As far as J. Howard, III was concerned, it was time to go public.

When J. Howard heard about this, he felt betrayed. J. Howard had shared the vision of a privately held company and its virtues with Fred and Charles Koch. It can be

safely said that he believed that J. Howard, III should never go against the family. J. Howard flew to California to try to change his son's position, but was unable to convince him. J. Howard then made J. Howard, III an offer to buy back the stock for $208 per share, a total of $8 million.

J. Howard took this action despite the fact that he viewed the purchase price as exorbitant. The previous highest transaction for Koch stock had been $80 per share between Koch and its employees. J. Howard felt that he had been forced to pay a premium to obtain this stock from his own son.

Because the dividends could not cover the financing for the $8 million transaction, J. Howard sold the stock back to the company. He had honored his commitment to his friend, the late Fred Koch, but it would have immediate consequences within his own family. J. Howard flew back to Houston and disinherited his eldest son. He considered the $8 million payment an early inheritance and planned to give him nothing more.

With J. Howard's faction firmly in control again, Koch Industries resolved to stay private. At Charles Koch's urging, Koch Industries bought out the stock of the dissident shareholders. The effect of this buyout was that the remaining shareholders' ownership interest nearly doubled. The Koch family (primarily Charles and David Koch) now own more than 80% of Koch's common stock and 88% of its voting stock. The buyout, however, would engender more troubles. Led by Bill and Freddie Koch, the dissident shareholders sued Charles and David Koch, J. Howard, Pierce, and the remaining Koch shareholders. They contended that the price that they received in the buy-out

was far below the true value of Koch Industries. Major litigation over billions of dollars commenced.

Charles Koch stated publicly and in sworn testimony that there are no present plans to go public. The Court accepts these representations. His father was dedicated to maintaining Koch as a privately held company and Charles Koch has remained steadfast in adhering to this goal. Market conditions may eventually force this company to go public, possibly to pay estate taxes. But as of this date, the longevity of this commitment to remain a private company, the lengthy and factious family dispute between Charles Koch and other family members who wanted to take the company public, and Charles Koch's testimony convinces the Court that going public is not a pending or planned event.

Due to the dispute over Koch's true value, reducing the apparent value of Koch Industries became an important goal for Koch shareholders, including Pierce and J. Howard.

E. J. Howard's New Estate Planning

In 1982, J. Howard embarked on an estate plan to make certain that the Koch stock would never be held hostage. His eldest son was completely excluded as an heir. A comparison of his 1979 will with his 1982 will demonstrates his intent to exclude his eldest son and leave Betty, and upon her death, Pierce, as his heirs. (Ex. 3203.) From 1984, Pierce was the ultimate beneficiary of J. Howard's estate. J. Howard employed attorney Harvey Sorensen to represent him and the various entities he created for his estate plan. He also asked Pierce to assist Sorensen in the creation of these entities.

On July 1, 1984, the company known as Marshall Petroleum, Inc. (MPI) was formed by J. Howard, Betty, and Eleanor in a Section 351 tax-free exchange of property for stock. MPI's assets comprised the separate property of J. Howard from Trust S, the separate property of Eleanor from Trust B, and Betty's share of her and J. Howard's "new community." In May of 1991, the company elected S-Corporation status.

At its formation, J. Howard owned 56% of MPI, Eleanor owned 37%, and Betty owned 7%. In 1989, Eleanor decided that she wanted to increase her charitable giving. She then established a Charitable Remainder Trust, with Pierce as the ultimate beneficiary, and sold a portion of her MPI stock back to the company for cash. In 1991, Betty died and her ownership passed to J. Howard and subsequently to Pierce. Over this time period, Pierce bought stock in MPI and received stock as compensation for his consulting services. By 1992, the ownership changes resulted in J. Howard controlling approximately 70% of MPI.

The main asset of MPI was J. Howard's Koch stock. Upon forming MPI, J. Howard transferred to MPI his Koch stockholdings. Although he hoped that MPI would become an active oil and gas company in its own right, and indeed for some time it was involved in various oil and gas deals, its only real purpose by the time J. Howard died was as a holding company for Koch stock. Through the veil of a corporation, J. Howard sought to protect his Koch stock, and pass it on to Pierce while avoiding as much estate tax consequences as possible.

The evidence reflects the number of Koch shares that MPI held. The Texas Commerce Bank required collateral

for a line of credit for MPI. The presentations to the Texas Commerce Bank Loan and Discount Committee, which were made while J. Howard was alive, state that J. Howard, through MPI, owned 862,535 shares of Koch stock. (Ex. 685.) The same documents indicate that MPI had pledged 505,885 shares to Texas Commerce Bank as collateral. Koch issued and had outstanding 5,850,908 shares of common stock. The 1995 Presentation lists J. Howard's percentage ownership as 14.7% based on his ownership of 862,535 shares of the 5,850,908 shares of Koch common stock as of December 31, 1994. (Ex. 685.)

The 1995 and 1996 Credit Approval Presentations state that "the bank does not receive financial statements on Marshall Petroleum and thus the dividend income that MPI receives from Koch stock is relied upon for repayment of bank debt. The Company [MPI] received dividend income of $8MM and $7MM in 1995 and 1994, respectively." The report notes that as a privately held company, access to Koch's audited financial statement is limited and that historically the bank received updates of Koch's financial performance from Pierce. (Exs.684, 685.)

F. J. Howard's Affair with Lady Walker

In 1982, J. Howard met "Lady" Diane Walker. Feeling the need for a drink after a day at the office, he went to a "strip joint, a titty bar" as he described it in his videotaped deposition in 1992. (Ex. 3225.) Lady Walker was one of the strippers who took everything off for J. Howard in return for his generous dollar bills. Thus, at the age of seventy-eight, he began his pursuit of Lady Walker.

J. Howard wanted Lady Walker to be his exclusive mistress and he often professed his desire and commitment to marry her if Betty died. Money was immediately bestowed upon her. The intensity of his pursuit is set forth in his letters to her.

These letters contain repetitive and aggressive protestations of his love, always coupled with a reference to money.[7] "Jungle Money" and "Pin" are code words for money that J. Howard gave to Lady Walker. "Pin" was a regular payment made on a consistent and timely basis,[8] "Jungle money" was a payment for her own pleasure,[9] and "big kills" were larger sums given sporadically to Lady Walker.[10] J. Howard also gave Lady Walker enormous amounts of jewelry, including more than $1 million purchased from Harry Winston and Nieman Marcus, the same

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[7] "Light of my life/ . . . Now, as always you can count on/my love and devotion – our 'Jun'/money is but a small sample of my concern for my lady – . . . " (Ex. 630, p. HBOM 0015501.)

" . . . my proposal to beg you to be my mistress." (Ex. 630, p. HBOM 0015502.)

"Dear Lady – /I fear I am a nuisance – I still hope I am a beloved nuisance – of course/I shall do what you ask 'stop calling' . . . it is part of the juice of my devotion . . . All of this is a far, far cry from the years gone by . . . you said I could 'call you/whenever I wanted.' I fear I have abused it. If so, it is only because I love you . . . " (Ex. 630, p. HBOM 0015505.)

[8] "Dear Lady – /Perhaps true love never/runs smooth – but since I love you truly, this 'pin'/ tries to tell you I am/Your devoted man" (Ex. 630, p. HBOM, 0015479.)

[9] "Lady love: /Jungle & Pin" (Ex. 630, p. HBOM 0015481.)

"My Lady Love – /Increased Jungle Money – /+/Pin/+/Sharom" (Ex. 630, p. HBOM 0015483.)

[10] "Another 'pin' to go with/Big Kill" (Ex. 630, p. HBOM 0015486, H-108-1480.)

stores at which he would subsequently buy jewelry for Vickie.

At one point, J. Howard sent Lady Walker the Koch Industries prospectus in an apparent attempt to impress her with his wealth. The front of the first page reads, "For Lady – /The Crown jewels/ J. Howard." (Ex. 630.)

This pattern of giving money, and even the terms that J. Howard used, is the same pattern that Vickie describes of J. Howard's pursuit of her a decade later. Lavish jewelry, regular payments of money, and sporadic gifts ushered these bar dancers into J. Howard's life. Apparently, it was extremely lucrative to have an affair with J. Howard. J. Howard spent approximately $2 million a year on Lady Walker, which is approximately the same amount of money he spent each year on Vickie when he pursued her a decade later.

J. Howard's statement that "men in love do stupid things and I was sure guilty" is accurate. (Ex. 3225.) In J. Howard's case, it was a consistent pattern.

G. The Death of Betty Marshall and Lady Walker and the Beginning of the Lady Walker Litigation

J. Howard's affair with Lady Walker continued uninterrupted until she died suddenly as a result of complications from facelift surgery on July 9, 1991 at the age of fifty-one. The effect of her death on J. Howard was initially described by him as the most tragic thing that ever happened to him. Ironically, shortly after Lady Walker's death, J. Howard discovered that she had betrayed their relationship and had been living with another, much younger, man during most of their affair. Outrage drove J.

Howard to sue her estate in January 1992 seeking the return of almost $15,000,000 in gifts that J. Howard had given Lady Walker (the Walker Litigation). J. Howard accused Lady Walker of fraud, claiming she received kickbacks from merchants after the items were purchased and the merchants had charged J. Howard's account. Because J. Howard hated lawyers and disliked handling details, he appointed Pierce to deal with the details of the matter.

H. IRS Gift Tax Audits

In 1989, J. Howard's gifts to Lady Walker came to the attention of J. Howard's attorney Harvey Sorensen. Sorensen, a tax specialist, became concerned. J. Howard had never filed gift tax returns on the gifts, nor had he indicated any particular concern with doing so. J. Howard's position with respect to the gift taxes was largely similar to his position with estate taxes – he did not want to pay them and it was his lawyers' job to figure out how to avoid them.

Sorensen, however, understood that the gifts were subject to a gift tax that had gone unpaid, and knew that this avoidance of the tax laws would cause substantial interest and penalties from the Internal Revenue Service. Sorensen eventually determined that between $12 and $14 million was given to Lady Walker without taxes being paid. In 1989, he filed amended tax returns for the years 1983-87. These eventually caused the IRS to audit J. Howard and initiate tax collection proceedings.

J. Howard repeatedly attempted to avoid taxes, and during the gift tax litigation, it was discovered that he had, in fact, found a way to use his affair with Lady

Walker to his advantage. In the gift tax litigation, J. Howard took the unlikely position that his "pin" payments to Lady Walker were consulting fees. At one point, he suggested that she received a salary of $1 million per year to handle his public relation work. He not only tried to escape gift taxes this way, but it is likely that he deducted his payments to Lady Walker from his income tax returns.

His efforts to hide gifts in the guise of legitimate business operations were disclosed in the testimony of his closest advisors. Jeff Townsend testified that Finley Hilliard, J. Howard's accountant, told Townsend that J. Howard wanted to funnel funds to Lady Walker. Two corporations were formed, in part as a way for J. Howard to give Lady Walker money. Stock of Coliseum, Inc. was held in trust for her benefit and he gave her gifts of Presidio, Inc. stock. Lady Walker also served on the MPI Board of Directors. When questioned about her functions, he replied, "I guess she was a Director – never active – she never undertook anything as a Director." (Ex. 3225.)

In 1993, Sorensen was relieved of his responsibilities of representing J. Howard, after more than ten years of service. Pierce contends that the reason Sorensen was terminated was because he was not aggressive enough in the disputes with the IRS. However, this contradicts the characterization of J. Howard being fiercely loyal to his employees, who were in turn loyal to him. Sorensen was eventually replaced as J. Howard's lead tax counsel and estate planning lawyer by Edwin Hunter, whose approach to tax litigation was far more aggressive, and whose actions on behalf of Pierce Marshall have become the focal point of the present case.

J. Howard, his family, estate, and MPI became mired in numerous disputes with the IRS. Once again, J. Howard would call on Pierce to handle the details of the litigation. These disputes focused on two critical issues: (1) gifts given by J. Howard to his paramours and (2) the valuation of MPI, and therefore Koch, stock. Once again, the legion of lawyers working on behalf of J. Howard, his estate, and later Pierce, were faced with the quandary of the defending the valuation of MPI and Koch stock.[11]

Reducing the value of Koch and MPI stock had become the central organizing principle of J. Howard's legal team. There was no other goal. They sought to make J. Howard, who was considered one of the 400 richest men in the world and the wealthiest in the state of Texas, appear to be holding as his primary asset a minority interest in a company that had very little market value, despite being one of the largest and most successful oil conglomerates in the country. Failure to do so would cost J. Howard millions of dollars in disputes with the IRS.

Koch valuation was just as important to Pierce, who personally owned Koch voting stock, making him a party to the Koch valuation litigation. He also stood to inherit J. Howard's Koch interest and the valuation problems inherent in these tax disputes with the IRS.

[11] Disputes over gift tax and inheritance tax liability between J. Howard's estate and the IRS are still pending, and the IRS has agreed to keep a settlement offer open until this Court's proceedings are completed. The IRS may want to take a closer look at the summaries written on J. Howard's personal account, and passed on to his accountant, for illegitimate tax deductions.

I. Summary

It is fair to say that J. Howard was an immensely successful businessman. He served on boards of numerous corporations and banks and became involved with a number of oil and gas ventures in Texas. J. Howard was also heavily involved in Koch Industries, as described herein. J. Howard's success earned him a ranking in Forbes Magazine as one of the 400 wealthiest men in America, and the wealthiest man in Texas. But the rating rankled J. Howard, and he claimed to dislike the publicity that it brought. What worried J. Howard more than publicity was the spotlight that it shined on his wealth. Being named as one of the richest men in the country was likely to attract the attention of the IRS.

J. Howard was a well-trained lawyer. Oddly, however, he did not appear to have much regard for the profession. He was reputed to dislike lawyers and the details of lawyering. To his mind, a legal document should never be more than one page long.[12]

J. Howard is also described as being irascible and demanding. Perhaps to those who knew him, those personality traits were endearing. To outsiders, he was viewed simply as impatient and hostile. His tendency to bang the table to make his point was viewed as being in command of a situation. However, the Court's view is that, at least late in his life, J. Howard's theatrics were transparent.

[12] It is ironic then that his death has created the largest volume of legal filings in the history of the Southern Division of Central District of California.

In addition, J. Howard's disregard for the tax codes was a pattern he followed his entire life. For ninety years, he showed nothing but contempt for the IRS and the tax codes of this country. Throughout his life he surrounded himself with excellent legal counsel who were creative in attempting to circumvent the tax codes.[13] He ignored gift taxes until he could no longer evade the issue. He railed against the inheritance tax provisions, claiming that being forced to pay estate and income taxes was "double taxation," while at the same time he avoided paying substantial income taxes by: writing off as business expenses the gifts to his paramours Lady Walker and Vickie, whom he claimed were consultants; financing his lifestyle by taking a line of credit against his valuable stock holdings, the proceeds of which are not taxable income; and hiding and manipulating his assets in aggressive accounting gimmicks.

In summary, this court is not impressed with the character of a man who had the finest private school and legal education and who consciously avoided the very taxes that millions of American families comply with every year. It is in the collection of these taxes that the government must rely on the good faith and honesty of our citizens to fund our nation's needs in time of peace and war. The fact that J. Howard could not see fit to comply with these laws, despite the great advantages that he was afforded by American society, speaks poorly of his character.

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[13] Surprisingly, much what J. Howard managed to do was within the confines of the law, allowing him to evade taxes by stepping through loopholes that only someone of his great wealth could afford to find.

II. VICKIE LYNN MARSHALL

Vickie dreamed of becoming the personification of her idol, Marilyn Monroe. Both became international superstars, traveling far from home under assumed names. Norma Jean's fame thrust her into the arms of an American baseball icon and a dashing young politician, while Vickie Lynn found herself in the company of a Texas oil baron. But her notoriety never reached the same heights or longevity. Her life is best described as that of a person who was rescued by her wealthy pursuer and taught to spend money at a breathtaking pace that most Americans cannot fathom. While she detested being thought of as a gold-digger, her actions leave little doubt that money was the central facet of her relationship with J. Howard. Her appetite for money, once developed, was incessant and outlandish by everyday standards.

Vickie appeared before the Court to testify for three days. Her communication skills were poor as she frequently had trouble engaging counsel. Her illiteracy is striking. Examples are too numerous to chronicle but include writing "25.00" meaning $2,500 and "4500,00" meaning $4,500 – she testified that she has trouble with zeros. In fact, she has only recently started learning to pay her own bills after years of managers and relatives managing her money. Vickie also finds herself in difficult times and is being treated for depression.

But education is no guarantor of integrity and a discredited profession does not mean a person lacks truthfulness. While Vickie certainly drew a more noble image of herself than the facts bear out, her testimony on the statements made by J. Howard are credible.

A. Background

Vickie Lynn Marshall was born in Houston, Texas in 1967. Her parents divorced shortly after she was born and her father moved away. She never saw him until she looked him up after she had become Playmate of the Year. In her teens she moved with her mother to Mexia, Texas, a small town in the eastern part of the state. She completed grade school, but failed her freshman year in high school, and never progressed past an eighth grade education.

Vickie worked as a waitress and morning cook at Krispy Fried Chicken in Mexia where she met Billy Wade Smith, who was the cook at the restaurant. At the age of 17, she married Billy Smith, and at the age of 19, she gave birth to her son Daniel, her only child. The marriage ended shortly thereafter, and Vickie moved back to Houston with Daniel when he was a year old.

B. Career as a Dancer

At this point in her life, Vickie was estranged from her family. Her husband, Billy Wade Smith was not providing child support and made no effort to visit Daniel. Initially she found employment at Walmart and later as a waitress at the Red Lobster, but she could not make enough money to support herself and Daniel. Vickie testified that one day, while on the way home from work, she passed a neon sign that displayed a lady in high heels wearing a bikini. She was interested in becoming a dancer, but deferred at first when she found out it was a nude dance bar. She initially sought a job as a waitress but was quickly talked into dancing on stage. After a couple of drinks, humiliated but

willing to dance, she overcame her inhibitions and continued as a dancer when she saw "all the money in her lap which paid the bills."

Vickie, however, was big-boned, and in the fashion trends of the late 1980's and early 1990's, her figure relegated her to the "B" team. Instead of working the lucrative night shifts, Vickie danced during the day, for less pay and fewer tips. But this apparent disadvantage would soon work in her favor.

III. J. HOWARD'S AND VICKIE'S TIME TOGETHER

J. Howard and Vickie began their relationship in October 1991, when they met at Gigi's in Houston, Texas. They married June 27, 1994 and their relationship continued until his death on August 4, 1995. They met when she was at the vibrant age of twenty-four, and he a sickly eighty-six year-old man. The issues of J. Howard's donative intent and Vickie's expectancy can only be understood by slowly unwinding their years together.

A. The Meeting of J. Howard and Vickie

After Lady Walker and Betty died in 1991, J. Howard entered a period of deep despondency. He appeared to his family and friends to have lost his zest for life. In 1991, J. Howard told his eldest son, J. Howard, III, that "he enjoyed having pretty women on his arm when he entered the River Oaks Country Club in Houston and that a great light had gone out of his life."

In October 1991, Vickie was dancing at Gigi's, a Houston strip club. Dan Manning was J. Howard's driver who frequented Gigi's and had seen Vickie dance. Manning

and J. Howard had talked about going to a burlesque bar and in October, Manning drove his boss to Gigi's to cheer him up. Because of J. Howard's age and physical condition, he did not go out at night, and thus they arrived during the day-shift, when Vickie worked. Manning approached Vickie and asked her to dance for J. Howard. According to Vickie, when she saw J. Howard, "he looked terrible, he looked like he had lost his will to live." While Vickie danced, J. Howard tried to grab her breasts. Thus began J. Howard's aggressive pursuit of Vickie's affection. He asked [] her to have lunch with him the next day. A description of this lunch helps to understand the pattern that they followed for the years of courtship prior to their marriage.

B. The Courtship

J. Howard initially took Vickie to a restaurant hotel and ordered room service. He told Vickie about Betty and Lady Walker and funny stories about himself. When she became concerned about her job, he gave her an envelope with a thousand dollars in cash and told her not to go to work. The following day they had lunch at River Oaks Country Club, where once again she was given cash. On each occasion, money was given to her ranging in amounts of $1,000 to $5,000 in cash. Vickie "stopped dancing right after Howard met me that day." (Dep. of Vickie, Dec. 28, 1999, vol. 3, p. 600.) J. Howard was soon paying all of Vickie's bills. Shortly after they met, J. Howard purchased a white Toyota Celica as a gift for her after her own car had been repossessed.

She started receiving $2,000 checks twice a month. (Ex. 48.) These checks were recorded by J. Howard's assistant Eyvonne Scurlock for consulting, just as his

previous "pins" to Lady Walker had been. Summaries prepared by Scurlock were then sent to J. Howard's accountant for tax purposes and 1099 Tax forms for Vickie were prepared. (AP 11462, Dep. of Eyvonne Scurlock, August 27, 1999. pp. 72, 576-577.) These $2,000 checks increased over time to $2,750.

Within a week of their meeting, J. Howard told Vickie that he was going to marry her. He had been re-invigorated by Vickie. While he had fallen into a state of deep despair after the deaths of Lady Walker and Betty, his relationship with Vickie brought him back to life. He called her "the light of his life." He told his attorney Harvey Sorensen numerous times that he wanted to marry Vickie.

According to Vickie, J. Howard asked her to marry him "tons of times." She contends that the proposals were usually accompanied by the same assurance that once they were married, she would have half of everything he had. His proposals occurred frequently, and are confirmed by numerous friends, employees and professional associates. He started buying her rings that increased in size and value. When he gave her rings, there was always the same conversation about marriage. "It seemed like every time he would buy me a bigger and bigger ring and he would ask me over and over and over and he was very pushy. He really loved me. He just really wanted to marry me." (Dep. of Vickie, December 28, 1999, p. 642.) During J. Howard's courtship of Vickie, he purchased at least three large engagement rings as well as numerous smaller rings. On each occasion, the giving of these rings was accompanied by the same incessant matrimonial proposals.

J. Howard's aggressive pursuit is illustrated by one instance where he purchased jewelry for Vickie from Nieman Marcus. On Christmas Eve 1993, David Watson, a Nieman Marcus employee, delivered various pieces of jewelry to Vickie's home for her and J. Howard to review. Vickie looked at all the pieces, and commented that a particular yellow diamond ring was too expensive and should not be shown to J. Howard. When J. Howard arrived, he looked at the jewelry and commented: "this is better than the Home Shopping Network." J. Howard then asked if he had seen everything. Watson, forgetting Vickie's admonition, showed J. Howard the yellow diamond ring. When told that the price was, $107,000, J. Howard stated: "Oh, just a baquetta." J. Howard then completed the purchase. That purchase, and an earlier one by J. Howard in April 1993, were the two largest purchases in store history.

During their courtship, J. Howard made numerous other gifts to Vickie. On September 16, 1992, J. Howard purchased a ranch for Vickie in Tomball, Texas, outside of Houston (the Tomball Ranch). This ranch was purchased in the name of the J. Howard Marshall, II, Living Trust (the Living Trust), but was intended for Vickie's use and benefit. J. Howard later purchased a home on Rusington Street in Houston, which was held by the Houston Land Trust, with her as the beneficiary. J. Howard also rented the Los Angeles house that Marilyn Monroe had lived in. When the lease expired, he purchased a house on Ashdale street in the Brentwood area of Los Angeles for her. J. Howard also provided Vickie with an apartment in New York City when she spent time there. He bought her $10,000 gowns that could only be worn once because in "Hollywood you could never wear the same dress twice."

Jewelry purchases from Harry Winston jewelers for Vickie exceeded $2 million. In 1992, J. Howard purchased a new Mercedes Benz for Vickie.

Vickie testified that J. Howard taught her to spend money, and that spending money was fun. She was the second of two women with little wealth and no experience whom J. Howard taught that there were no limits to the fun of spending money if they were with him.

J. Howard eventually introduced Vickie to Pierce. On one occasion in 1992, J. Howard took Vickie and Pierce to lunch at the Royal Oaks Country Club. From the outset, the relationship between Vickie and Pierce was tense. Vickie already believed that Pierce did not like her, and felt that during the entire lunch he was giving her "mean looks." According to Vickie, when J. Howard went to the restroom, Pierce told her "don't let J. Howard buy you anything else."

J. Howard nevertheless repeatedly proposed to Vickie. She had just started taking voice and modeling lessons when she met J. Howard, and although she was flattered by these proposals, she wanted to have a career first. Vickie put off J. Howard almost three years before she finally accepted his proposals.

Shortly after they met, Vickie saw an ad in the newspaper to audition for *Playboy Magazine*. After meeting with a scout, Vickie was quickly hired and two weeks later was doing a test shoot in California. In March 1992, Vickie made her *Playboy* debut, appearing on the cover. In May 1992, she was named *Playboy* Playmate of the Month.

Vickie was contacted by Guess Jeans to be part of its national advertising campaign. She became their top

spokes-model for a one-year period from 1993-94. During this time, she appeared in numerous other magazines and in 1993 was named the *Playboy* Playmate of the Year. Vickie had achieved the level of international sex symbol, and was one of the most recognized print models in the world. Her stardom only encouraged J. Howard to pursue her with a newfound vigor.

In Spring 1994, Vickie was on tour for Guess Jeans in Singapore. While there, she and the Guess Jeans entourage were mobbed by fans. The incident scared her, and the remainder of the tour stops in Japan and the Philippines were cancelled. When she returned home to Houston, J. Howard once again proposed to her. J. Howard repeated that she was the woman who had saved his life, that he would take care of her and her son, and that she would have half of everything he had. This time, Vickie accepted.

Vickie testified that his money was a factor in her decision to marry J. Howard, but contends that she would have married him anyway. Vickie sought security for her and her son, and what he might lack in youth, vigor, and looks, J. Howard made up for with his great wealth. Although she has often been portrayed to the Court as a gold-digger and predator, she did hold a certain regard for J. Howard, and was willing to compromise her prime modeling years for someone who showered her with gifts and offered financial security.

C. The Marriage of J. Howard and Vickie

J. Howard and Vickie were married on June 27, 1994 at the White Dove Wedding Chapel in Houston, Texas. Although numerous prenuptial agreements had been

prepared, beginning as early as 1992, none were signed, nor was any such agreement ever discussed with Vickie.

The wedding was not widely announced, and Pierce did not learn of the wedding until after it occurred. Only a few close confidantes attended, including J. Howard's assistant Eyvonne Scurlock, his new driver Arnold Wyche, his nurse Charlotte Fade, and Vickie's aunt and uncle, Elaine and Melvin Tabers. Henry Schlesinger, one of the MPI executives was invited, but did not attend.

The night of the marriage, Vickie flew to New York on an assignment, leaving J. Howard in Texas. On July 6, 1994, J. Howard left for California to visit his new wife.

During their marriage, J. Howard continued to give extravagant gifts to Vickie. J. Howard also considered adopting Vickie's son Daniel. One of J. Howard's lawyers, Jeff Townsend began seriously investigating the issue. He contacted counsel in California about possible adoption proceedings and traveled to California to meet with attorney Lawrence Leone. (Ex. 143.) The adoption, however, never took place because Townsend determined that he would not be able to obtain consent from Daniel's natural father, Billy Wade Smith. The steps taken to begin an adoption proceeding demonstrate that J. Howard was prepared to undertake a greater commitment to Vickie and her son, not only during his lifetime, but long afterward.

Vickie and J. Howard also tried to have children of their own. Initially, they tried to have children in what Vickie described as "the normal way." When that did not work, J. Howard went to a fertility doctor to seek advice and treatment.

D. Post-nuptial estate planning changes

After J. Howard and Vickie were married, J. Howard's estate plan changed. Although his will was not changed at that time, the Living Trust was amended to become irrevocable. His interest in MPI was reduced until, by summer of 1995, he was stripped of all of his ownership interest in the company. These changes were made by a series of documents that are the heart of the claims of tortious interference, *infra*.[14]

E. Illness and Death of J. Howard

J. Howard traveled to Los Angeles in December 1994 to spend Christmas and New Year's with Vickie and Daniel. He and Vickie had, until that time, kept their relationship out of the public spotlight. They planned to make their relationship public at the New Year's Eve party at the *Playboy* Mansion in Beverly Hills.

J. Howard was overjoyed. His joy at being with Vickie is demonstrated by pictures of him with Vickie that Christmas. (Ex. 264.) Although Vickie appeared to have a pleasant Christmas Day, she spent most of the rest of the

[14] The primary documents that changed J. Howard's estate plan are, *inter alia*: the Grantor Retained Annuity Trust (GRAT) of August 1993; the sale of MPI stock to Pierce in exchange for a promissory note in August 1993 (the Pierce Note); the Amended and Restated Living Trust of July 13, 1994; the Assignment of the Pierce Note, purportedly dated June 1, 1994; the Promissory Note between J. Howard and MPI, purportedly dated June 1, 1994; the Pledge of Pierce Note to MPI, purportedly dated June 1, 1994; the Renunciation of Income Distribution from the Living Trust; the Donation of the GRAT to the Living Trust; and the Sale for Private Annuity of MPI stock.

time J. Howard was visiting hidden away in her separate bedroom.

After Christmas, J. Howard fell ill and returned to Houston, where he planned on picking up his tuxedo and seeing his doctor before returning to Los Angeles in time to attend the New Year's Eve party with Vickie. However, J. Howard's illness turned out to be pneumonia and he was hospitalized at the Park Plaza Hospital on January 1, 1995.

J. Howard returned home after his release from the hospital on January 13, 1995 but he never regained his good health. On January 23, 1995, Vickie returned to Houston from Los Angeles and found J. Howard in a deplorable state. She stayed up with him that night, and she and his nurse Charlotte Fade fed him chicken soup. Sometime in the early morning hours, J. Howard choked and his heart stopped. CPR was administered and J. Howard was rushed to the Spring Branch Hospital, where he stayed until February 9, 1995.

After this near-death experience, Vickie's dispute with Pierce began in earnest. Pierce had left instructions that J. Howard was not to be suctioned and Vickie was infuriated. She believed that Pierce had decided to let his father die. During J. Howard's stay in the hospital, Pierce refused to pay for her bills or give her any additional money. On February 4, 1995, Vickie went to Spring Branch Hospital at 2 a.m. to visit J. Howard. She brought along a friend of hers, Raymond Martino, a Hollywood producer. Martino videotaped Vickie and J. Howard together, presumably so that Vickie could use the tape in court – either of law or of public opinion. On another occasion, Vickie brought a tape recorder and sought to tape J. Howard. She

climbed into his bed, exposed her breasts and asked J. Howard: "Do you miss your rosebuds?" (Testimony of Letisha Hunt, Tr. of Tex. Probate Trial, Feb. 21, 2001, pp. 18-19.)

During this time, it was clear that J. Howard was dying. His attorney Jeff Townsend began making funeral arrangements and trying to determine who would take charge of J. Howard's body. (Ex. 650, p. 21929.)[15] On February 22, 1995, J. Howard again returned to Park Plaza Hospital, where he stayed until March 30, 1995. While there, J. Howard underwent gall bladder surgery. In the Spring of 1995, unbeknownst to Vickie, J. Howard was diagnosed with inoperable, terminal stomach cancer.

As his health deteriorated, the dispute between Vickie and Pierce intensified. Pierce believed that Vickie's bills were excessive and directed that all of Vickie's creditors contact her directly. He stopped paying for her expenses. Vickie sued in state court in Harris County, Texas for spousal support.[16] That litigation was soon followed by guardianship proceedings, where Vickie and Pierce both sought to be appointed guardian of the person of the ailing J. Howard. When J. Howard returned home, Pierce hired off-duty Houston police officers to guard J. Howard at his home. Although Pierce testified that these guards were

[15] Townsend's research proved prescient. The odiousness of the parties involved in this case was displayed when Pierce sought to have J. Howard cremated, while Vickie insisted he be buried in California. The Texas probate judge, seeking the wisdom of Solomon, ordered that the ashes be divided between Pierce and Vickie. *See* 1 Kings 3:16-28 (King James). Pierce and Vickie each took their half of J. Howard's remains.

[16] During this time period, Vickie had hundreds of thousands of dollars in her checking account.

hired only to insure J. Howard's safety, they appeared in situations where there was no danger of harm. Vickie was not allowed to visit J. Howard without the guards being present. Glenn Johnson, who the Texas probate court had appointed temporary guardian ad litem for J. Howard, testified that he too was not allowed to visit J. Howard without the presence of the guards. Johnson testified that the guards were intimidating and opined that they had been hired to prevent Vickie from visiting J. Howard. He believed that Vickie, who was in Houston frequently during June and July of 1995, wanted to see J. Howard more often, but would not go to J. Howard's home because of the guards. Pierce had reason to keep Vickie from seeing J. Howard, because, as detailed, *infra,* he was concerned that she might be able to get him to sign a new will or gift instrument.

Nevertheless, from April through July, Vickie visited or telephoned J. Howard on a nearly daily basis. Vickie's visits decreased in July 1995, when she spent some time in the hospital herself. On August 4, 1995, J. Howard died at the age of 90. He was survived by his two sons, his wife, and an unprecedented volume of litigation.

In sum, their lives were intertwined in need, driven by greed and lust. Nevertheless, the Court is convinced of his love for her. J. Howard referred to Vickie as the "light of my life," and the lady that saved his life. His relationship with her provided the happiest moments of his last few years. He considered Vickie his reason for living, and the joy that she brought him undoubtedly helped him live another four years. There is no question that he showered her with gifts, that he sought to protect her and provide for her.

The Court is more cautious about her love for him. J. Howard became Vickie's knight in shining armor. His help propelled her to the highest levels of stardom, something unimaginable for a girl from her background. She cherished the protection and security that he afforded her and the lavish gifts that he gave to her in order to win her affection. J. Howard used his money to get Vickie to fall in love with him, and in her own way, Vickie loved J. Howard.

IV. TORTIOUS INTERFERENCE

A. J. Howard's Donative Intent

Upon meeting Vickie, J. Howard immediately began bestowing numerous gifts upon her. As detailed *supra*, J. Howard gave Vickie millions of dollars worth of gifts in the form of cash, property, cars, and jewelry. Besides these gifts, however, the evidence demonstrates that J. Howard intended to give Vickie a gift that would provide for her once her modeling career was over and he had passed on.

In the fall of 1992, J. Howard's estate planning lawyer Harvey Sorensen began preparing for J. Howard's goal of wedding Vickie. At J. Howard's direction, he drafted a pre-nuptial agreement for J. Howard and Vickie. This agreement was presented to J. Howard on November 18, 1992. The draft pre-nuptial agreement was 58 pages. (Ex. 3242.) The draft agreement provided that Vickie would receive certain amounts of money upon the termination of the marriage by either death or divorce. Vickie was to receive $100,000 for each month that J. Howard and Vickie were married. Vickie was also to get an additional $5 million if she and J. Howard had a child together. Largely as a result of J. Howard's lingering bitterness from Lady

Walker's betrayal, J. Howard insisted that the draft agreement include a provision that if Vickie had intercourse with anyone other than J. Howard during their marriage, that her payment would be reduced by half. (Ex. 3342.)

J. Howard believed the draft agreement was too long. He insisted that legal documents be only one or two pages and he directed Sorensen to revise the agreement. But from this time forward, J. Howard adhered to his plan to make a substantial gift to Vickie. One of his last recorded statements is a tape recorded message to the Texas probate judge on May 26, 1995, where he states: "I want my wife [Vickie] to be supported by me." (Ex. 364.)

During this same time period, J. Howard turned to attorneys Edwin Hunter and Jeff Townsend, both of Lake Charles, Louisiana. He gave Hunter the draft pre-nuptial agreement that Sorensen had prepared and asked Hunter to prepare a new pre-nuptial agreement that was not so long. At this point, he set Townsend and Hunter to work on a parallel path as Sorensen.

At the same time, J. Howard was seeking other avenues to give gifts to Vickie. J. Howard directed Townsend and Hunter to prepare documents for a "Marshall Farms" corporation to run the Tomball Ranch that he had purchased for Vickie. (Ex. 58.) Additionally, he asked Hunter and Townsend to prepare documents for a "corporation for Vicky's [sic] business." (Ex. 58.) Through this, J. Howard intended to buy Vickie numerous gifts of clothing and jewelry that would help her develop her career and image in Hollywood. In order to make the corporation not appear to be a sham to the IRS, Vickie would sign an agreement for the corporation to have rights to exploit her

celebrity image through goods such as perfume and clothing, in exchange for salary from the corporation, another gift to Vickie. Vickie was to eventually receive the proceeds from these goods.

Finally, J. Howard directed Hunter and Townsend to draft a "catch-all" trust for Vickie. (Ex. 58.) As described, *infra,* this draft trust instrument was never produced to the Court. However, the circumstances under which it was drafted lead the Court to the inescapable conclusion that the "catch-all" trust was intended to be a document whereby J. Howard would transfer assets to Vickie, to be held in trust for her until after his death.[17]

On December 14, 1992, J. Howard and Townsend spoke about the plans for Vickie. Townsend primarily specialized in gas and oil leases, but was a confidant to J. Howard, and fulfilled many roles. The next day, he sent a letter to his colleague Hunter. It memorialized his conversation, and asked for a progress report. (Ex. 58.) It detailed the four things that J. Howard wanted done: a prenuptial agreement, the Marshall Farm corporation, the corporation for Vickie's business, and a "catch all trust." (Ex. 58.) Townsend's letter was a reminder to Hunter to get to work.

On December 22, 1992, J. Howard met with Pierce, Hunter, Townsend, and Sorensen to review these matters

[17] The Court finds that the evidence before the Court sufficiently establishes the existence of a draft "catch-all" trust instrument prepared by Edwin Hunter. However, if the evidence had not been sufficient, the discovery abuses in this case might have led the Court to deem this fact as established as a sanction. *See* Fed.R.Civ.P. 37(b)(2)(A); Minute Order of October 5, 2001 Re: Evidentiary Sanctions.

related to Vickie, as well as other pieces of ongoing litigation. (Ex. 3245.) Sorensen's handwritten agenda included four specific "VLS Proposals": a "Family Farm Corporation," a "Modeling Corporation," a Grantor Retained Income Trust, or "GRIT," and adoption.[18] (Ex. 3245.) The agenda also included the pre-nuptial agreement as a separate agenda item. (Ex. 3245.) Unsatisfied with the results his attorneys had produced up until that time, J. Howard turned back to Sorensen.

J. Howard again told Sorensen that he wanted to marry Vickie. He told Sorensen that he wanted to provide Vickie with half of his "new community." (Ex. 62.) Sorensen testified that:

> new community was Mr. Marshall's words. He obviously intended to make her a gift. Well it's important to him because he wanted to share with her something he had done . . . "I am going to make this Koch Industries greatly enhanced in value and I want her to share in my achievements."

(Tr. of Tex. Probate Trial, Nov. 2, 2000, p. 181.)

Consistent with his propensity to avoid taxes, J. Howard did not want to trigger any gift tax liability, but wanted the gift to be "legally enforceable." (Id.) J. Howard defined for Sorensen what he meant by "new community," a term that he had previously employed when married to

[18] This was not J. Howard's plan to adopt Vickie's son, which came about later. Instead, at the time, J. Howard was considering adopting Vickie, so as to avoid the generation skipping tax. Sorensen pointed out to him that Texas law might frown on the type of relationship he was having with his new "daughter."

Betty. (Id.) As he had done with Betty, J. Howard defined "new community" as the growth of all his assets, even if they were separate property, during the time he was married to Vickie.

In discussions with Sorensen, the two concluded that his principal asset was his interest in MPI, and therefore Koch Industries. (Ex. 62.) J. Howard believed that the growth in Koch Industries would come from its recent acquisition of the United Pipeline System, which he believed he had been instrumental in bringing about. (Id.) Although he did not plan to give her Koch stock outright, J. Howard was particularly interested in sharing with Vickie the fruits of that labor in the growth of the value of Koch stock.

J. Howard also made clear at that time that he wanted Vickie to have the benefit of the gift after he had passed away. J. Howard was aware that Vickie's career had a short life cycle. Although he could provide for her during his lifetime, he wanted her to have financial security and a comfortable retirement. J. Howard knew that Vickie had limited intelligence and experience. He would later call her "unteachable." Accordingly, he believed that some form of trust would be appropriate to provide for her after his death.

On his flight to Kansas the next day, Sorensen dictated a memo memorializing his conversation with J. Howard (the New Community Memo). (Ex. 62.) Sorensen and members of his firm researched the possibility of making such a gift to Vickie. Like all of J. Howard's lawyers, they ran into the dual problems of Koch stock valuation and Gift Tax liability. Indeed, because J. Howard was so much older than Vickie, a gift to her would also be

subject to the Generation Skipping Tax of 55%. Sorensen eventually determined that the gift could not take place at that time because of the tax liability.

J. Howard's tax concerns, however, were always a short-term problem. He planned to marry Vickie, and once he did th_re would be no tax liability for the Generation Skipping Tax or the Gift Tax. At one point, Hunter told J. Howard that he would solve all of his gift tax problems related to Vickie if he simply married her. Indeed, when J. Howard first told Hunter of his marriage to Vickie, he told Hunter that he had done so on Hunter's advice.

J. Howard's intent is also demonstrated by his interest in having children with Vickie. As noted *supra*, J. Howard seriously considered adopting Vickie's son Daniel. The adoption did not occur only because it became clear that Daniel's natural father would not give consent to the adoption. Moreover, Vickie and J. Howard attempted to have children of their own. J. Howard's intention to have children with Vickie demonstrates his interest in taking on substantially greater responsibilities toward Vickie and her children. These responsibilities would surely have included providing for his children's mother after he had passed away.

B. Vickie's Expectancy

J. Howard repeatedly proposed marriage to Vickie. On at least three specific occasions, J. Howard's proposals included specific promises of gifts to Vickie.

When the Tomball Ranch was purchased in 1992, Vickie was concerned about her right to the property because her name had been crossed out on the deed and

she was wary of Pierce. Vickie explicity recalls that J. Howard told her "he wanted to take care of me and my son and give us security and he promised me half of everything that he had, that he wanted to always take care of me and always have me taken care of because of his age and all." (Dep. of Vickie, Dec. 28, 1999, p. 612-622.) Vickie's testimony before this Court was nearly identical on this issue.

Her second explicit recollection of donative intent was the purchase of a new 1993 Mercedes. Vickie wanted to get the title in her name and J. Howard stated, "honey, don't worry about it. Once we are married, you will have half of everything that I have."

The third time J. Howard made an explicit promise to her was when she returned to Houston in June 1994, after having been mobbed in Singapore on her Asian tour. "He just told me – I think he was missing me real bad because I was gone for a full week. And he just – I believe that he missed me really bad and he asked me to please marry him and that he loved me and that I would have half of everything that was his. I would have security for me and my son; and so finally I accepted his proposal." Shortly thereafter, Vickie and J. Howard were married.

No evidence was produced to show that anyone other than Vickie heard these specific proposals. However, the Court is guided by life experience in making the rather unremarkable finding that most proposals are not trumpeted to the public or made in the presence of the family attorney, especially when the pursued object of matrimony has declined repeated proposals for nearly three years.

The privacy of J. Howard's proposals is corroborated by Harvey Sorensen. In March 1992, Sorensen had dinner

with J. Howard at the River Oaks Country Club. At that dinner, Sorensen met Vickie for the first time. When she arrived, J. Howard asked Sorensen to excuse himself while J. Howard and Vickie spoke. While secretly watching the couple, Sorensen saw J. Howard give Vickie a ring and an envelope which Sorensen thought had money in it. J. Howard's promises are also corroborated by his pattern of sharing his "new community" with his second wife Betty and his seeking Sorensen's aid in creating a mechanism to give Vickie one-half of his "new community."

Although Vickie believed that J. Howard promised her one-half of his fortune, the Court finds that J. Howard always intended to give Vickie only half of his "new community." J. Howard, who used his wealth to impress women, did not explain to Vickie that what he meant by "half" referred to the "new community." Such a statement would be far less impressive.[19] Furthermore, such a statement would have meant little to Vickie, who was not familiar with what J. Howard meant by "new community," and would not be capable of grasping the distinction. Vickie therefore accepted J. Howard's promise at face value.

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[19] The dichotomy of the statements is illustrated by two hypothetical proposals:

> "Dear Vickie, please marry me and I will give you one-half of our 'new community,' which is a term I have coined and define as the appreciation of my assets, which primarily consist of Koch Industries stock, which is held by a holding corporation I created called MPI, the shares of stock of which are held in a living trust, which I amend from time to time;" or
>
> "Dear Vickie, please marry me and I will give you half of everything."

C. Edwin Hunter's Credibility

Edwin Hunter appeared before the Court to testify from December 12 to December 17, 2001. Hunter is a member of the bars of Louisiana, Texas, and Washington, D.C. He attended Louisiana State University for both undergraduate and law school. He began his legal career by working for a New Orleans firm in 1968. He later moved to Lake Charles where he became the head of the tax and estate planning division, and later the president, of a local firm. Since 1986, Hunter has been practicing in his own firm in Lake Charles, Louisiana, which is currently called Hunter, Blazer & O'Dowd (the Hunter Firm). Hunter represented MPI, J. Howard, and a number of the various trusts, all of which are now controlled by Pierce. Besides estate planning, Hunter's primary work for J. Howard in the years immediately preceding his death related to the on-going tax disputes between J. Howard and the IRS, which included questions on the value of gifts given to Lady Walker and the value of both MPI and Koch Industries.

Hunter was central to J. Howard's estate planning in the years prior to his death. Although Harvey Sorensen had taken over representation of J. Howard's estate planning in the early-1980's, and was responsible for drafting J. Howard's original living trust, Hunter began doing estate planning work for J. Howard in 1992. By mid-1993, Hunter had supplanted Harvey Sorensen as J. Howard's primary estate planning counsel. Hunter was responsible for the drafting of a number of J. Howard's final estate planning documents including the Amended and Restated Living Trust of July 13, 1994. The bankruptcy court found that Pierce "conspired with Hunter . . ." in tortiously interfering with J. Howard's gift to

Vickie. *Marshall* I, 253 B.R. at 554. Obviously Hunter's credibility is therefore of utmost importance in determining the facts of the case.

For the reasons set forth below, the Court finds that Hunter lacks credibility as a witness. First and foremost, Hunter's lack of credibility was consistently demonstrated to the Court by numerous falsehoods made before the Court that were directly contradicted by documentary evidence in the case and, in some instances, by other witnesses on Pierce's side. Second, Hunter has several motives to distort the facts in this case: to cover up his wrongful conduct during the events that give rise to this case; to preserve a settlement offer from the IRS on the value of MPI and Koch Industries in the continuing gift tax litigation, in which he continues to represent the Marshall family interests, now managed by Pierce; and to endear himself to Pierce, who has inherited J. Howard's wealth, whom Hunter admits was one of his largest clients. Finally, Hunter's lack of credibility was demonstrated by dishonest actions and his apparent willingness to abuse the high standing of his close family members.

Hunter's false statements are detailed first. The statements include, but are not limited to the following:

1. *Hunter's statement that he did not draft a "catch-all trust."*

During the proceedings before this Court, Hunter was asked where the draft of the "catch-all" trust was. Hunter claimed that he did not know. At that point in the proceedings, counsel for Vickie argued to the Court that it should sanction Pierce for his discovery abuses by designating as established that such a draft trust existed and would have

been a mechanism to make gifts to Vickie. Hunter then stated that he "suddenly remembered" that the "catch-all" trust referred to a voting trust agreement for Compagnie Victoire. Hunter's "sudden" recollection, after six years of litigation in this matter is incredible on its face. Moreover, such a recollection is contradicted by the facts of the case.

On December 15, 1992, Jeff Townsend sent Hunter a letter urging him to finish his work on four documents related to Vickie, all of which were to be presented to J. Howard at a meeting later that month. (Ex. 58.) Those documents were a draft-prenuptial agreement, a family farm corporation, a modeling corporation, and a "catch-all" trust. Hunter's billing records indicate that he and other members of the Hunter Firm worked on the first three documents prior to his meeting with J. Howard on December 22, 1992. (Ex. 649, p. 4.)

Not only do Hunter's billing records show his work on the first three items referenced in Townsend's December 15, 1994 letter, but they also demonstrate that he and members of the Hunter Firm worked on the "catch-all" trust. On November 10, 1992, his partner Glynn Blazier had a "[t]elephone conference with Finley Hilliard and Jeff Townsend regarding proposal to create trust for estate planning purposes." (Ex. 649, p. 2.) Additionally, Hunter's billing records show that he had a telephone conference with Blazier regarding the same. (Ex. 649, p. 2.). Hunter and Blazier again held a conference on a proposed trust on December 16, 1994. (Ex. 649, p. 3.) And finally, Hunter's billing records show that Glynn Blazier drafted a trust document on December 21, 1994. (Ex. 649, p. 4.)

That work on a "catch-all" trust was undertaken is also corroborated by Sorensen's handwritten agenda for

the meeting with J. Howard, where he includes discussion of a GRIT, which was never produced. (Ex. 3245.)

Hunter claims that the term "catch-all" trust was used by Townsend because he was an oil and gas lawyer and thus did not understand the complexities of estate planning.[20] Townsend, however, as a corporate lawyer, would have been well aware of a voting trust and how it works, and would not mistakenly have referred to it as a "catch-all" trust.

Hunter further testified that the voting trust for Compagnie Victoire was necessary because Vickie was worried that she would not control the company because J. Howard owned all the stock. Thus, according to Hunter, a voting trust would assure her that she would control the company. Documents in evidence, however, show that Compagnie Victoire was not created until 1993 and that Vickie did not know of its existence until after its creation. Thus, Hunter could not have been preparing a document to ease Vickie's concerns about control of a corporation that she had no idea existed at the time. Moreover, the evidence shows that the voting trust for Compagnie Victoire was not put into place until several months later. Furthermore, the Court is quite confident that, based upon her limited intelligence and understanding of business affairs, Vickie would not understand the workings of a voting trust. Hunter later claimed that the "catch-all" trust was subsumed into Compagnie Victoire.

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[20] Townsend did, however, carry out several personal, estate related, legal services for J. Howard, including investigating the possibility of adopting Vickie's son.

Unfortunately, the Court must conclude that Hunter was untruthful. A draft "catch-all" trust was prepared, or, at the least, J. Howard directed Hunter to prepare one.

2. Hunter's statement that he did not know when the Fine Tuning Memo (Ex. 310a) was originally drafted.

In fact, Hunter knew full well that the Fine Tuning Memo was drafted on July 8, 1994. Hunter's billing records indicate that he drafted "Marshall post-matrimonial plan" on July 8, 1994. That corresponds with a statement in the Fine Tuning Memo that J. Howard had not told his children of his marriage to Vickie as of July 8, 1994. (Ex. 310a, p. 1.)

In the bankruptcy court, Hunter claimed that the "Marshall post-matrimonial plan" referred to in the billing records was the Amended and Restated Living Trust instrument dated July 13, 1994. (T2247.)[21] That was demonstrated to be false because Hunter's billing records indicate that Cherry Doucet drafted the Amended Living

[21] As a result of this perjured testimony, there are portions of the bankruptcy court's proposed findings of fact and conclusions of law which mistakenly refer to the Amended and Restated Living Trust as the Fine Tuning Instrument. Pierce's Amended Assignments of Error often quibble with the bankruptcy court's findings on the matter. (*See, e.g.*, Am. Assignments of Error ¶ 25: "There is no evidence that J. Howard ever saw or was informed of the contents of the Fine Tuning Document."; Am. Assignments of Error ¶ 27: "The Fine Tuning Document does not purport to change the provisions of the Living Trust. . . ."; *see also, e.g.*, Am. Assignments of Error ¶ 26, 28.) These contentions are the height of bad faith. *See* Fed.R.Civ.P. 11(b)(2), 11(b)(4).

Trust on July 11, 1994, after receiving instructions from Hunter. (Ex. 649, p. 103).

This is important because it shows that the July 13, 1994 Amended and Restated Living Trust was changed to comport with the goals set forth in the Fine Tuning Memo which was drafted July 8, 1994, and therefore the Court can gain insight into the changes to the Living Trust by reference to the Fine Tuning Memo.

3. Hunter's statement that the reference "mischief" in the Fine Tuning Memo did not refer to gifts for Vickie.

Hunter's Fine Tuning Memo states that his plans would leave "less for mischief (and Miss Cleavage)." (Ex. 310a, p. 12.) Although Hunter admitted that "Miss Cleavage" referred to Vickie, he denied that "less for mischief" referred to allowing J. Howard to have less money that he could give to Vickie. Instead, Hunter disingenuously claimed that the phrase meant less for unspecified "waste." This deception was intended to hide what Hunter's perceptions about J. Howard were and his efforts to strip J. Howard of his assets.

4. Hunter's statement that he did not cause the Assignment, Promissory Note, and Pledge (Exs.287-289), to be backdated.

The Assignment, Promissory Note, and Pledge all purport to be dated June 1, 1994. However, Hunter's billing records show that Cherry Doucet of the Hunter Firm worked on "revisions of pledge" on July 11, 1994. (Ex. 649, 103, # 7535.) There is no record of a meeting with Pierce or J. Howard to sign these notes on June 1, 1994,

nor are there records indicating that Hunter prepared these documents prior to June 1, 1994. Hunter's Fine Tuning Memo, which was drafted after J. Howard's June 27, 1994 marriage to Vickie, addresses these transactions and indicates that they should occur in the future. (Ex. 310a, p. 6, VII.A.4.)

In an attempt to explain away his billing records indicating that he had worked on these documents, Hunter furthered his dishonesty by suggesting that those records could refer to another pledge, but did not say what pledge that was, or show that it had ever been produced. Finally, Hunter suggests that maybe J. Howard and Pierce caused the documents to be backdated after they were delivered. However, the dates on the documents are all typed, not handwritten in.

5. *Hunter's statement that he did not cause the donation of the GRAT to the J. Howard Marshall, II Living Trust to be backdated.*

The act of donation document purports to be dated January 13, 1994. Hunter testified that he did not backdate the document. That is contradicted by Hunter's Billing records which indicate that on July 12, 1994, Cherry Doucet of the Hunter Firm "[d]rafted donation of interest in GRAT." The January 1994 date is printed like the rest of the document.

6. *Hunter's Statement that Pierce was never shown the Fine Tuning Memorandum (Ex. 310a).*

Hunter's billing records for July 8, 1994 indicate that he drafted the Fine Tuning Memorandum and faxed it to

Pierce. (Ex. 649, p. 102.# 7662.) ("Draft Marshall post-matrimonial plan; fax to E. Pierce Marshall. . . ."). This contradicts his statement of loyalty to J. Howard and demonstrates that he was working on Pierce's behalf.

7. *Hunter's statement that he researched annulling J. Howard's marriage to Vickie to defend J. Howard from any actions taken by Pierce.*

Hunter said that J. Howard told Hunter that he was very much in love with Vickie. Hunter, however, began researching annulment in the Fine Tuning Memo. Hunter testified that the reason he began researching annulment is that he was concerned that J. Howard would ask him if Pierce, holding J. Howard's power of attorney, could seek to have J. Howard's marriage annulled. This is completely inconsistent with Hunter's testimony that Pierce always followed his father's orders. Neither Hunter nor J. Howard would be concerned with Pierce seeking to annul J. Howard's marriage to Vickie if Pierce respected his father's decisions and never interfered with J. Howard's relationship with Vickie. Hunter was therefore either lying as to the degree of control exercised by J. Howard over Pierce, or, as the Court finds, as to whom Hunter was preparing the Fine Tuning Memo for.

8. Hunter's statement that he believed, in May 1995, that J. Howard would live for 5 years.

This is relevant because on May 26, 1995,[22] J. Howard allegedly approved two documents which changed his estate plan. By the first document, the J. Howard Marshall, II GRAT, created in August 1993, sold back to MPI 47,288 shares of MPI. (Ex. 3376.) The other document was for sale of 63,051 MPI shares to MPI for a private annuity. (Ex. 3770.) Neither of these annuities were scheduled to make payments to J. Howard until March 1996. Hunter, like Pierce, testified that these annuities would have been economically beneficial to J. Howard had he lived for another five years. Hunter testified that he believed at the time that J. Howard would live for another five years. This is pure fiction.

In May 1995, J. Howard was already ninety years-old, and even reference to actuarial tables would suggest that he had less than five years to live. In fact, a year earlier, Hunter had done just that, finding that at 89, J. Howard had less than five years to live. (Ex. 310a, p. 7-8.) By May 1995, J. Howard had spent a large part of the previous five months in the hospital. On January 24, 1995, J. Howard had been rushed to the Hospital after his heart had stopped, and was only revived after CPR was administered. Townsend testified that he began looking into funeral arrangements for J. Howard in January 1995. Townsend testified that J. Howard never regained a healthy appearance in 1995, and he several times believed that J. Howard was close to death. If J. Howard's

[22] This document may also have been backdated, *see infra*.

advanced age, his near-death experiences, the obvious breakdown of his physical health, his extended hospital stays, and his need for 24 hour nursing care did not make it clear enough to Hunter that J. Howard would not live for another five years, in Spring 1995, J. Howard's physician, Dr. Reed, had diagnosed him with terminal, untreatable and inoperable stomach cancer. In April 1995, Dr. Reed opined that J. Howard might have as little as three months to live.

9. Other actions that demonstrated Hunter's lack of credibility

The Court's judgment of Hunter's credibility does not rest merely on these specific lies, made under oath before this Court (some of which were lies that he had [] previously made before the bankruptcy court). The Court also finds that his central role in the plan to drain J. Howard of his assets, which was undertaken in part to prevent J. Howard from making a substantial gift to Vickie, undermines his credibility.

This Court is not the first to question Hunter's character. Besides the bankruptcy court, which found that Hunter had conspired with Pierce to alter documents and deprive Vickie of her intended gift, Harvey Sorensen's firm, Foulston & Seifkin, found Hunter's ethics questionable. On June 20, 1994, Andrew Wright[23] prepared a research memo for Harvey Sorensen to advise him on his professional responsibilities relating to what Sorensen believed was Hunter's "probable professional misconduct"

[23] It appears that Andrew Wright is another attorney in Sorensen's firm.

in altering the GRAT, as discussed in Part W.D.8.ii, *infra*. (Ex. 281, Memo p. 3.) According to Wright, Hunter had acted incompetently, disreputably, had refused to comply with tax regulations, and had done so with the intent to defraud. (Ex. 281, Memo pp. 5, 7.) Wright concluded that Hunter's conduct would be viewed by the Department of Treasury as "disreputable, intentionally fraudulent, and perhaps incompetent." (Ex. 281, Memo p. 7.) Wright recommended that Sorensen report Hunter to the relevant disciplinary bodies. (Id.)[24]

Finally, the Court is concerned that Hunter acted unethically in attempting to impress Pierce with his family's judicial prominence. Vickie's counsel argued that Hunter and Pierce were involved in planning to use these connections to gain an advantage in dealing with J. Howard's estate.

The Fine Tuning Memorandum prepared by Hunter includes statements that deal with estate planning once J. Howard had married Vickie. (Ex. 310a.) Up until Hunter drafted the Fine Tuning Memorandum on July 8, 1994, J. Howard had been co-trustee, along with Pierce, of the J. Howard Marshall, II Living Trust. On page 3 of that Memo, Hunter addresses concerns about how to choose a successor trustee upon J. Howard's death. On page 3, paragraph d, Hunter lists numerous options. The last of these is to "let longest serving federal judge in Texas

[24] While the Court has no information as to Sorensen's eventual actions, Foulston & Siefkin informed Pierce and J. Howard that they would not second-chair the tax litigation behind Hunter. Although no reason was given to the Court, the Court believes that Sorensen and his firm did so in a successful effort to disassociate themselves from Hunter.

appoint successor." (Ex. 649, p. 3.) This suggestion is out of place considering that state courts, not federal courts, are primarily responsible for probate matters. *See Marshall III*, 264 B.R. at 621. In the next sentence, Hunter's thinking becomes more clear: "[sidebar . . . my father is now the longest serving federal judge in the United States]" (Ex. 649, p. 3.) (Brackets in original.)

Hunter's father is the Honorable Edwin F. Hunter, Jr., Senior District Judge for the Western District of Louisiana, and as Hunter's Fine Tuning Memorandum indicates, he is the longest serving federal judge in Louisiana and the United States, having been appointed to the Bench by President Eisenhower in 1953.

When taken in context of the other events in this saga, Hunter's self-styled "sidebar" is not an innocuous note to himself. On the next line of the Fine Tuning Memorandum, Hunter's suggestion for the Living Trust was to "[p]ermit the trustee to re-situs trust if it gives an advantage." (Ex. 310a, p. 3.) Indeed, the Living Trust was later re-sited to Louisiana, where Pierce initiated succession proceedings. *See Howard Marshall Charitable Remainder Trust*, 709 So.2d at 662. Had Hunter's plans been followed through with, the longest serving federal judge in the state of the trusts' new situs, his father, would have been given authority to choose a successor trustee. There is no evidence before the Court that these thoughts ever evolved past the planning stages, or that Judge Hunter was even aware of his son's plan. However, these events demonstrate Hunter's apparent willingness to exploit his father's high position.

Vickie's counsel points out, however, that this is not the only instance where Judge Hunter is referred to in

connection with this matter. Vickie's counsel also argued that Hunter and Pierce were involved in attempting to solicit advice from a judicial officer. On January 27, 1995, Harry Winston sued J. Howard over a bounced check that he had written while purchasing jewelry for Vickie. Disputes arose between Vickie and Pierce, as J. Howard did not have the cash to cover the check. Pierce had been responsible for solving the problem and returning the jewelry to Winston. Vickie, however, never returned the jewelry, and Harry Winston sued. On April 22, 1996, Judge Audrey Collins of the Central District of California, issued findings of fact and conclusions of law in that matter, and entered judgment in favor of Harry Winston. This ruling upset Pierce. In response, Pierce sent a memorandum to Edwin Hunter, outlining numerous strategic alternatives for the Harry Winston case, as well as for Vickie's bankruptcy. (Ex. 431.)[25] Part 2.B of that memorandum details how Pierce and his lawyers could determine his options for legal recourse. Included is the following passage:

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[25] During the presentation of the case to the Court, several documents were made available to Vickie's counsel by Pierce, with Pierce reserving the right to object to them based on privilege. The Court has not relied on any document as evidence that is subject to a legitimate claim of attorney-client privilege. However, Exhibit 431 is potentially privileged communication from Pierce to his attorney Hunter. The Court, however, finds the exhibit admissible for two reasons. First, throughout the proceedings, Pierce has contended vehemently that Hunter did not represent him, and Hunter has testified to the same effect. Second, this document is admissible under the crime-fraud exception to the attorney-client privilege. *See, e.g., United States v. Chen*, 99 F.3d 1495, 1503 (9th Cir.1996). Here, the communication shows Pierce arranging to have Townsend seek information from a federal judge about a separate pending civil action. This constitutes a fraud on the court and potentially obstruction of justice in violation of 18 U.S.C. § 1503. Pierce's objection of privilege is therefore overruled.

> 2. Obtain all the pleadings and briefs for review by Judge Hunter. I very much appreciate this very valuable step. It would be most helpful to have the Judge's advice regarding what elements are needed to:
>
> A. Successfully move for a new trial and prevailing;
>
> B. Successfully move for an appeal and prevailing.
>
> 3. After the Judge has had a chance to review the case, Jeff [Townsend] needs to visit with him to discuss the issues and the Judge's advice . . . .
>
> 4. Seek the advice of other "wise men" who may be able to help us achieve our objectives A & B above.

(Ex. 431, pp. 1-2.) Pierce confirmed during his testimony that "Judge Hunter" referred to Edwin Hunter's father, Judge Edwin F. Hunter, Jr. Later in the memorandum, where he writes:

> I think we were badly home-towned, but perhaps it is good because we will be more ready next time for what to expect from the California courts. We need to modify our behavior and analysis accordingly. That is the purpose of the experience. We need to use aggressively every opportunity to home-town them in Louisiana,

(Ex. 431, p. 4.)

This memorandum makes clear that, at the very least, Edwin Hunter had offered to Pierce the services of his father, a sitting federal district judge, in analyzing and recommending litigation strategy for a client in an attempt to overturn the ruling of a fellow district court

judge.[26] In addition, the phrase "other wise men" appears to refer to other judicial officers in the state.

This conduct gives rise to even more serious questions about Hunter's character. If Hunter was merely seeking advice, on behalf of Pierce, about the prospects for winning a new trial or an appeal, he could have approached dozens of well respected appellate law firms.[27] Approaching a judge, in violation of the principles of ethics, suggests that Hunter was seeking to use Judge Hunter's influence, not just his legal skills, in order to further Pierce's litigation posture. Such an approach is unquestionably unethical, potentially criminal, and certainly shows Hunter's character to be untrustworthy.

The Court concludes that Edwin Hunter's testimony consisted of numerous lies, and that he has no credibility as a witness.[28]

D. Tortious Acts by Pierce and Hunter that Deprived Vickie of her Expectancy

1. Pierce's Knowledge and Motivation

From early in J. Howard's relationship with Vickie, Pierce knew of the gifts that J. Howard was giving to

[26] The fact that the memorandum was written by Pierce indicates that Pierce was complicit in this conduct.

[27] The Court notes that Pierce has been represented in this matter by the Los Angeles firm Jeffer, Mangels, Butler & Mamaro, one of the most prominent firms in the city.

[28] In light of Hunter's behavior, the Court encourages the United States Attorney for the Central District of California to undertake a close review of the record in this case to determine whether to seek an indictment for perjury under 18 U.S.C. § 1621.

Vickie. He was aware of J. Howard's pattern of giving to his lovers based on his involvement with the Lady Walker litigation and the related gift tax litigation. Pierce knew that J. Howard was starting that same gift-giving pattern with Vickie. He knew that J. Howard had purchased the Tomball Ranch for Vickie as he had signed the deed as co-trustee of the Living Trust.

In the late fall of 1992, J. Howard was preparing to marry Vickie and planning on making a substantial gift to her. Pierce was present at meetings between his father, Hunter, Townsend and Sorensen when J. Howard detailed the type of gift that he was going to make. J. Howard had asked Pierce to coordinate all the details, and accordingly Pierce had frequent contact with J. Howard's lawyers and knew what their assignments were.

J. Howard's plan to give Vickie money based on the value of Koch Industries stock was immediately problematic. Pierce had been responsible for managing litigation with the IRS, one of the central components of which was the value of Koch Industries stock. Pierce and Hunter recognized that if Vickie had any interest in MPI stock, as proposed in the New Community Memo, she would have an interest in increasing the value of that stock. The teaming of a widowed wife with the IRS loomed as a bad combination in the goal of keeping down the value of Koch stock. This was crucial to Pierce, who stood to inherit MPI, and owned Koch stock in his own right. Pierce would therefore tolerate his father's extravagant gifts to Vickie in the form of houses, cars, jewelry and cash. But he could literally not afford to allow J. Howard to give Vickie any interest in Koch or MPI.

2. *The Replacement of Harvey Sorensen with Edwin Hunter*

In Edwin Hunter, Pierce found a person who would aggressively pursue his interests. Hunter had an obviously low opinion of Vickie. He was far more willing to be aggressive in tax litigation than Sorensen. Hunter knew that Pierce was already managing the details that J. Howard so despised dealing with. Hunter's practice of law was all about details. He designed creative and intricate estate planning schemes on a daily basis, the success of which were based on the details of the plans. So while J. Howard would pass over details with a dismissive wave of his hand, Hunter knew that the devil, and therefore the power, was in the details. Hunter also knew that, in time, Pierce would control the interests of the Marshall family and MPI, whose representation could prove extremely lucrative to him.

Hunter was aware of J. Howard's long-held estate planning goals. J. Howard never wavered in his desire to leave Pierce in control of MPI and with his Koch Industries stock. But J. Howard's reckless cavorting with Vickie could endanger those plans. Hunter therefore would act as a guardian of J. Howard's interests.

Sorensen was not so amenable. His ethics were different than Hunter's. Pierce eventually informed Sorensen that he was no longer responsible for Marshall family work. (Ex. 230.) This decision was J. Howard's, who preferred Hunter's more aggressive approach to the IRS. However, this decision was made at the counsel of Pierce, who was given the ultimate responsibility for terminating Sorensen.

J. Howard was notoriously loyal to the people that had worked for him. In the 1960's, when Finley Hilliard had left the accounting firm of Peat Marwick, J. Howard had demanded that his business go with Hilliard, and threatened Peat Marwick that he would personally defend Hilliard if they sued him. This loyalty would not allow him to terminate his attorney of ten years, a man that had become his closest legal adviser and a friend that stayed at his home in Houston, without some outside provocation.

Pierce was responsible for following the details of the Lady Walker litigation. He was the only person that could describe the advantages of one or the other to his father. J. Howard also placed immense trust in Pierce. Thus, when Pierce suggested to J. Howard that Hunter replace Sorensen, J. Howard consented.

3. *August 1993 Changes to J. Howard's Estate Plan*

Evidence of the scheme to drain J. Howard of his assets is demonstrated by the immediate changes to J. Howard's estate planning once Hunter took over. In December 1992, Sorensen had devised a method for J. Howard to begin to give up his controlling interest in MPI. (Ex. 60.) This was important for estate planning reasons. By converting his voting stock to non-voting stock, it would be given a non-voting discount in valuation. Additionally, if he was able to bring his percentage ownership under 50%, he would not suffer the upward adjustment for a controlling interest and would be able to take a discount for a minority position. J. Howard, however, had never voluntarily given up control of anything in his life. He had insisted on being in charge. In his deposition in the Lady Walker litigation, he insisted that MPI never took directions

from anyone other than himself. Accordingly, Sorensen had devised a plan for J. Howard to obtain an irrevocable proxy over Pierce's MPI stock. (Ex. 60.) J. Howard would then be able to control MPI by voting Pierce's stock.

In August 1993, Hunter told J. Howard that this arrangement was unworkable. He contended that if J. Howard gave stock to Pierce with an irrevocable proxy, it would be an incomplete gift, and subject to the estate tax upon J. Howard's death. Despite his proven creativity in tax and estate matters, Hunter told J. Howard that the only way to give up his controlling interest was to sell his shares and trust Pierce to vote the way J. Howard told him to.[29]

In preparation for his meeting with J. Howard, Hunter sent him an estate planning packet of 151 pages. (Ex. 3285.) Based on his past experience with J. Howard, including his drafting a pre-nuptial agreement for J. Howard and Vickie in December 1992, Hunter knew that J. Howard wanted legal documents that were a page or two long. Instead of following these well-known preferences, Hunter buried J. Howard in paperwork, filled with details, that Hunter knew J. Howard would never review.

J. Howard was also capable of being controlled by Hunter and Pierce because of his physical inability to read

[29] The Court suspects that there were several other ways of insuring J. Howard's control of MPI, including an irrevocable proxy on the shares owned by Eleanor Pierce Marshall Stevens, who appeared to leave many business decisions in her ex-husband's hands, or by giving J. Howard a proxy of the shares of MPI that Pierce had previously acquired, which, combined with J. Howard's 49% interest, would be sufficient to keep J. Howard voting a majority of the MPI shares, and thus in complete control.

as a result of having developed cataracts. Thus, J. Howard only read papers printed in extremely large type, and then only with the assistance of reading glasses. J. Howard's practice was to have someone read the document to him. Hunter was responsible for reading a number of documents to J. Howard.

On August 25, 1993, J. Howard signed several documents relating to MPI and his estate planning:

i. J. Howard resigned as a trustee of the MPI voting trust, the trust that technically controlled the voting stock of MPI. (Ex. 3289.)

ii. He sold to Pierce 35,466 shares of MPI stock, representing 15% of the outstanding stock of MPI. (Ex. 3292.)[30] Pierce bought those shares with a promissory note in the sum of $17,355,000, at a rate of 6.26% interest. (Ex. 3291.) The note called for Pierce to pay $575,000 on the first of January and July of each year, with a balloon payment in ten years (the Pierce Note). (Id.)[31]

iii. J. Howard signed a Grantor Retained Annuity Trust (GRAT). (Ex. 3293.) J. Howard transferred 47,288 shares of MPI, representing 20% of the outstanding shares, to the GRAT. J. Howard would receive a payment

[30] At the time, J. Howard owned 164,252 shares of MPI stock. The total number of outstanding MPI shares at the time was 236,440. J. Howard therefore owned approximately 69.5% of MPI before these transactions.

[31] J. Howard did not live ten years to receive the balloon payment. The Pierce Note, meanwhile was later assigned to the Living Trust, of which Pierce was the primary beneficiary. The result was that Pierce avoided paying a substantial sum due on the note.

from the GRAT each year for five years, after which the shares would transfer to Pierce.[32]

iv. J. Howard gave Pierce an outright gift of 2044 shares of MPI, with Pierce responsible for paying the gift taxes. (Ex. 3288.)

v. J. Howard sold back to MPI 14,065 shares in order to cancel his outstanding debt to MPI. (Ex. 3294.)

The result of these transactions was that J. Howard's ownership interest in MPI was reduced to 65,389 shares, a mere 29% of his corporation. The beneficiary of these transactions was Pierce. Although now legally in control of MPI, Pierce's goal was to prevent a transfer to Vickie that might increase the purported value of his shares and undermine the ongoing litigation with the IRS.

4. The Wedding of J. Howard and Vickie and the Surveillance of J. Howard

On June 27, 1994, J. Howard married Vickie. Several members of J. Howard's personal and MPI staff were invited, although Pierce was not. The next day, Pierce and Hunter held a conference call with Henry Schlesinger, who was invited to the wedding. (Ex. 649, p. 101). Pierce and Hunter likely found out about the wedding that day from Schlesinger.[33] This began a flurry of activity by Pierce,

[32] In the event of death, most of the shares in the GRAT would revert to J. Howard's estate.

[33] Hunter claims to have found out in Houston from J. Howard himself. There are no records of this meeting with J. Howard. As noted *supra*, the Court does not find Edwin Hunter credible. Nevertheless, it is clear that Hunter knew about the marriage before July 6, 1994, when J. Howard left to visit Vickie in Los Angeles. Pierce claims that he

(Continued on following page)

Hunter and others to alter J. Howard's estate plan so as to prevent Vickie from receiving a gift and undermining their hard work to reduce the apparent value of MPI stock.

On July 6, 1994, J. Howard left for Los Angeles to visit Vickie. (Ex. 3326, p. 4.) With Pierce's authorization, Dan Hedges hired private investigators to trail J. Howard in California. Pierce had the bills sent directly to his home address in Dallas. Pierce claims that this trail was for J. Howard's protection because Vickie's bodyguard, Pierre DeJean posed a safety risk to J. Howard. The Court, however, finds that the surveillance was not for J. Howard's protection, but instead was to guarantee against J. Howard signing a new will while in California. The Court's finding is based on the following reasons.

i. Pierce and Hedges did not tell J. Howard's driver Arnold Wyche, or J. Howard, that J. Howard was being trailed for his own safety. If Pierce was concerned with J. Howard's safety, he would have told J. Howard and Wyche to warn them of the potential threat.

found out about J. Howard's wedding on July 11, 1994 from Dan Hedges, another of J. Howard's attorneys. The Court finds this incredible. The evidence in Hunter's billing records indicates that Hunter faxed to Pierce the Fine Tuning Memo, which refers to the wedding (Ex. 310a), on July 8, 1994. (Ex. 649, p. 102.) Additionally, Hunter's billing records show numerous conversations with Pierce after Hunter had found out about J. Howard's wedding, and there is every reason to believe that Hunter told Pierce. Finally, J. Howard's wedding was common knowledge at the MPI offices, and Pierce had by that time become President of MPI. It is therefore incredible that Pierce did not know about the wedding shortly after it occurred. Evidence of surveillance placed on J. Howard while he traveled to Los Angeles after the wedding further corroborates this finding.

ii. The surveillance in California ended between 7 PM and 9 PM in the evening. (Ex. 3326.) If DeJean posed a serious threat to J. Howard's safety, it would have been a twenty-four hour threat. Instead, the surveillance ended around the time that J. Howard typically went to bed and would therefore not be able to sign a new will or other document in favor of Vickie.

iii. The surveillance was of J. Howard, not Pierre DeJean. (Ex. 3326.) If Pierce were concerned about J. Howard's safety, he would have DeJean trailed to check his contacts and his actions.

iv. On February 17, 1995, Townsend sent a letter to Vickie's lawyer Patrick Freydl. (Ex. 84.) He indicated to Freydl that:

> [i]t has been reported by reliable sources that either a will, or other type of contract, was executed by Mr. Marshall in California, and that you prepared such a will or contract. On behalf of Mr. Marshall, demand is made for immediate production of any document executed by him . . . . In order that there is no question as to my exact request, please note that I am requesting the original . . . .

(Ex. 84.)[34]

On February 24, 1995, Dan Hedges sent a letter to Pierce, copied to Hunter and Townsend, informing Pierce that Freydl had denied writing a will. (Ex. 675.) The letter

[34] Townsend's request for the original is particularly troubling. Given the record of document tampering in this case, there is an obvious concern that an original in the hands of Pierce and Hunter would be altered or destroyed.

states that this contradicts DeJean's information on a will. Pierre DeJean was evidently the "reliable source" that Townsend referred to. It is unlikely that Pierce considered DeJean a danger to J. Howard in July, but by February considered him a "reliable source."

v. The investigators hired by Pierce kept a liaison with the Federal Bureau of Investigations based on their stated fear that Vickie and DeJean might become involved in interstate or wiretap fraud in their attempt to obtain J. Howard's assets, but never contacted local authorities to express their professed concerns about J. Howard's physical safety. (Ex. 3326, p. 12).

vi. In the Fine Tuning Memo of July 8, 1994, Hunter indicated the major concerns regarding J. Howard traveling to California:

> J. Howard's office believes Vickie's attorneys in California may be preparing documents for his signature, possibilities include:
>
> a. A new will
>
> b. Adoption of Vickie's child
>
> c. Gifts to Vickie

(Ex. 310a, p. 1.)

The concerns of Pierce, Hunter, and "J. Howard's office"[35] demonstrate that they believed that J. Howard could in fact be controlled and tricked into signing away his estate. Their concern was not unfounded. Pierce and Hunter had already drained him of significant assets in

[35] This likely refers to Eyvonne Scurlock and Henry Schlesinger.

August 1993. They now set out on a plan to continue that drain before Vickie's lawyers could get their hands on J. Howard's assets. Despite all the concern of Pierce, Hunter, and "J. Howard's office," there was never any evidence introduced that ~~Vickie~~ or her lawyers attempted to have J. Howard sign a will, adoption documents, any gift instrument, or any other document divesting J. Howard of his wealth.

5. July 1994 Changes to J. Howard's Estate Plan

On July 8, 1994, Edwin Hunter drafted the Fine Tuning Memo. (Ex. 310a.) This is reflected in his billing records for July 8, 1994. (Ex. 649, p. 102, # 7662.) This memo formed the foundation of plans to prevent J. Howard from making a gift involving MPI or Koch stock that would disrupt the gift tax litigation or run the risk of valuing Koch stock at a high price. The thrust of the plan was to make sure that any property owned by J. Howard be put into his living trust and to make his living trust irrevocable so that J. Howard would be unable to make any gifts to Vickie. Hunter's Fine Tuning Memo indicates the importance of making the living trust irrevocable. Were J. Howard, then eighty-nine years old, to be declared incompetent, Vickie, as J. Howard's wife, would have the preference under both Texas and California law of being appointed guardian of J. Howard. (Ex. 310a, p. 2, B.1-2.) Hunter notes that "[h]er appearance as J. Howard's guardian might disrupt the estate plan and could lead to litigation with the family." (Ex. 310a, p. 2, B.4.) Hunter and Pierce were concerned that Vickie's meddling might lead to a transfer of property away from Pierce and to her, leading to a high valuation of Koch stock. Moreover,

making the trust irrevocable would leave "less for mischief (or Miss Cleavage)," meaning Vickie. (Ex. 310a, p. 12, 2.a(2).) Hunter's office immediately began drafting several documents to accomplish this goal.

Along with several other goals, Hunter and Pierce addressed the August 25, 1993 Pierce Note. Under Texas Community Property law, income derived from J. Howard's separate property would be community property. (Ex. 310a, p. 4, IV.A.1.b.) Hunter's office then prepared documents to prevent Vickie from ever being able to collect any of the money from Pierce's payments on the note. J. Howard signed a promissory note to MPI for $5,618,074. (Ex. 288.)[36] To secure this debt, J. Howard pledged to MPI the August 25, 1993 Pierce Note. (Ex. 289.) This would allow MPI, now run by Pierce, to intercept the note payments before they reached J. Howard and Vickie, and use the payments to pay down the debt owed to MPI. (Ex. 310a, p. 6, VII.A.4.b.) Because the Living Trust was also being made irrevocable, Vickie would never be able to recover those proceeds. Hunter was concerned that by encumbering the note, there might be an improper interference with Vickie's community property interest in the income stream. To solve this problem, those documents were then backdated to June 1, 1994, before J. Howard and Vickie were married, as detailed in Part IV.D.8.iv, *infra*. By backdating the note, it also served to void any

[36] The comments in Hunter's Fine Tuning Memo suggest that this was money that J. Howard already owed to MPI. (Ex. 310a, p. 6, VII.A.) Indeed, it was J. Howard's custom to support himself by borrowing funds from MPI, which in turn borrowed funds from Texas Commerce Bank, backed by MPI's interest in Koch. J. Howard would then settle the debt with MPI by selling shares of stock back to MPI. These debts, however were unsecured.

instrument assigning the note to Vickie as a gift that they feared J. Howard might have signed while in California.

On July 12, 1994, Hunter, Pierce, Jeff Townsend, Hilliard, Scurlock, and J. Howard met at the MPI offices in Houston. Pierce at that time confronted his father about his marriage, at which point J. Howard admitted to Pierce the he had married Vickie. The group briefly discussed estate planning options with J. Howard and was ordered to reconvene the next day.

On July 13, 1994, and again on July 15, 1994, Hunter, Pierce, Townsend, Hilliard, Scurlock, and J. Howard met at the MPI offices in Houston to sign J. Howard's estate planning documents. Because J. Howard could not see well enough to read the document, Hunter read to J. Howard what he considered to be the pertinent provisions of the Amended and Restated Living Trust. Pierce was in the next room when Hunter read the document to J. Howard, but was present when J. Howard allegedly signed the Amended and Restated Living Trust. During this period, J. Howard also signed the Assignment, Pledge, and Promissory Note that purport to be dated June 1, 1994. (Exs.287-289.) J. Howard also signed an act of procuration (power of attorney) and a donation of his membership in the River Oaks Country Club to the Living Trust during this period.

After J. Howard had signed the Amended and Restated Living Trust, a new page two of the trust was inserted, as detailed in Part IV.D.8.v, *infra*. The new page contained the provision stating that the trust was irrevocable. Because J. Howard was totally dependent on Hunter to inform him of the contents of the document, he was unaware that the amendments made the trust

irrevocable. The evidence shows that nearly a year later, he still believed that he had total control of his assets. On May 26, 1995, J. Howard made a tape recorded statement to the judge in the guardianship proceedings wherein he stated: "despite what Pierce or anybody says, I have been a successful businessman and am not broke." (Ex. 364.) By that time, however, J. Howard had been stripped of his remaining assets and was technically broke. Furthermore, Glenn Johnson, who was appointed by the Texas probate court as J. Howard's temporary guardian on May 31, 1995, testified in the Texas probate proceedings that he had a conversation with J. Howard about his estate plan. According to Johnson, J. Howard's opinion of the changes to his estate plan were as follows: "He trusted Pierce and had no problem with it, and if he ever didn't like it, he could change it." (Ex. 3638.) However, because the Living Trust had been made irrevocable, and J. Howard divested of all his MPI stock, he could not change his estate plan. J. Howard had been duped.

Following the signing of the Amended and Restated Living Trust, the document was given to J. Howard's assistant Scurlock, who also notarized the signatures. Four to six days later,[37] on July 19, 1994, Scurlock gave the document to Townsend for him to record. Townsend then took the document from Houston to his office in Lake

[37] There was a disagreement about whether the Amended and Restated Living Trust was signed on July 13, 1994 or July 15, 1994, thus it is unclear whether there were four or six days between its execution and its delivery to Townsend for recording. This is due in part because page one and page twenty-two indicate two different dates of execution. Although this is an example of the many questionable factors of the document, *see* Part IV.D.8.v, *supra*, the discrepancies between July 13 and July 15 appear to be immaterial.

Charles, Louisiana. The next day, Townsend had a stack of copies of the document made at his office. In his office, Townsend had a relatively modern photocopy machine equipped with a document collator. Townsend's plan was to record the document and provide the copies to the county recorder to certify, saving the time and expense of having the county recorder copy the documents.

The morning after Townsend had the copies made, he flew from Lake Charles to Midland, Texas. From Midland, Townsend drove approximately 30 miles south where he recorded the Amended and Restated Living Trust in Glasscock County, Texas. Glasscock County is one of the smallest counties in Texas. It has a single courthouse, but there are no lawyers in the County. Glasscock County's sole prior claim to fame was that it had a lakebed that filled every 20 years.

Upon arriving at the Glasscock County Courthouse, Townsend met the county clerk, Betty Pate, and her deputy, Shirley Wood. They informed Townsend that they could not use his copies, and would instead have to make the copies of the document in the county offices. Townsend discarded the copies he had brought from Lake Charles and Pate and Wood proceeded to make approximately 40 copies of the document on the Glasscock County copy machine, and collated the copies by hand. The original was then recorded and the copies certified. Townsend then used the certified copies to record the trust instrument by mail in several counties in Texas and parishes in Louisiana.

Had the Living Trust been recorded in Harris County, the public records would have been more readily accessible, and it is possible that the press would have found out

the details of J. Howard's personal finances. Indeed, another of J. Howard's lawyers, Dan Hedges, had obtained public record information of J. Howard's wedding to Vickie. Recording the document in the smallest county in Texas made that nearly impossible. One explanation for this is that Pierce did not want a story printed, or a friend of J. Howard's telling him, about the Living Trust being made irrevocable.

6. Further Changes to Estate Plan Between July 1994 and May 1995

Over the next year, J. Howard's health deteriorated. He was hospitalized on three different occasions, diagnosed with terminal cancer, and never recovered his physical strength. J. Howard's ill-health engendered a guardianship dispute between Pierce and Vickie. On May 31, 1995, the Texas probate court appointed Glenn Johnson the temporary guardian of the person of J. Howard. After Johnson's report to the probate court, Betty Morgan was appointed permanent guardian.

Several final changes to J. Howard's estate plan were undertaken during this time. Pierce and Finley Hilliard, as trustees of the J. Howard Living Trust, re-sited the trust to Louisiana. (Ex. 341.) As Hunter had written in the Fine Tuning Memo, this was an option to exercise if it would give them an advantage. (Ex. 310a.) By moving the trust from Texas to Louisiana, Pierce, Hunter and Hilliard were taking advantage of Hunter's familiarity with Louisiana – they were preparing to "hometown" any opponents, as Pierce would later describe it. (Ex. 431.)

Acting under his power of attorney, Pierce signed a document renouncing J. Howard's right to collect distributions from the living trust. (Ex. 145.) The renunciation was purportedly signed on December 28, 1994. According to Pierce, he read the document over the phone to J. Howard, who was then at his home in Houston. Pierce claims that J. Howard then told him to sign the document. This claim is not credible. It was J. Howard's intent to keep for himself as much income as he could, allowing him to finance his lifestyle and his gifts to Vickie. He had no interest in renouncing his right to obtain income from the living trust.

Pierce may have signed this document in the Spring of 1995, while he was feuding with Vickie over spousal support and guardianship. Pierce had discontinued paying Vickie's bills, and by renouncing J. Howard's right to demand income from the Living Trust, he would be cutting off Vickie's derivative rights.

Furthermore, the document is irregular on its face. It was notarized by Eyvonne Scurlock. As detailed in these findings, Eyvonne Scurlock fraudulently notarized several backdated documents prepared by Hunter. Her notary book bears no record of having notarized the Renunciation on December 28, 1994. (Ex. 676.) Moreover, Finley Hilliard's signature as a co-trustee of the living trust was not notarized until February 22, 1996, more than six months after J. Howard's death. (Ex. 145.)

Accordingly, the Court finds that the document was not signed in December 1994.

7. *May 1995 Changes to the Estate Plan*

The last set of changes to J. Howard's estate planning purportedly took place on May 26, 1995. J. Howard's remaining 63,051 shares of MPI stock were sold back to MPI in exchange for a private annuity. (Ex. 3370.) Under the terms of the annuity, MPI would pay J. Howard $7,906,006 on March 31 of each year, commencing in 1996, as long as J. Howard was alive. (Ex. 3370.)[38] J. Howard did not live to see March 31, 1996, and accordingly the MPI ended up paying nothing for J. Howard's remaining shares. Nor could J. Howard be reasonably expected to live until March 31, 1996. J. Howard had been diagnosed with terminal stomach cancer in Spring 1995. Pierce, who signed the Sale for Private Annuity as both the co-trustee of the J. Howard Living Trust and as President of MPI was entirely aware of J. Howard's condition. He had been advised of the diagnosis by J. Howard's physician Dr. Reed in April 1995. Pierce therefore arranged to strip J. Howard of his final vestiges of ownership in MPI for no consideration.

Also purportedly on May 26, 1995, the GRAT sold to MPI the 47,288 shares of MPI that it held in exchange for a $24,753,376 note. (Ex. 3376.) The terms of the note were that MPI would pay interest of approximately $1,898,584 to the GRAT each year, with the principle on the note due in 2010.[39] (Ex. 90.) Transferring the stock out of the GRAT

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[38] The annuity provided that the payment would increase by 20% each year.

[39] Pierce testified that, had J. Howard lived until March 31, 1996, MPI would have had to borrow nearly $10 million to finance the payments due on the private annuity and note. At the time, MPI had obtained a $15 million line of credit from Texas Commerce Bank, secured by MPI's interest in Koch stock. According to Pierce, Texas

(Continued on following page)

was necessary to prevent MPI stock from falling into Vickie's hands, because if J. Howard were to die before 1998, 99% of the corpus of the GRAT would return to J. Howard's "estate." (Ex. 3293.) Pierce had been continually concerned that J. Howard might have signed a will in California, giving money and possibly leaving his residuary estate to Vickie. This concern motivated him to conduct surveillance on J. Howard while he was in California, (Ex. 3326), was expressed in Hunter's Fine Tuning Memo, (Ex. 310a, p. 4, "C. Effect of a Clandestine California Will"), was evidenced by Townsend's letter to Pat Freydl indicating that Townsend had information that Freydl had prepared a will for J. Howard, (Ex. 84), and was the motivation for making the Living Trust irrevocable.

Pierce and Hunter both testified that these changes were undertaken at J. Howard's direction. This was in the face of the obvious incredibility of a ninety year-old man, diagnosed with terminal cancer, agreeing to give up his last assets in exchange for an annuity that he would never live to see paid. Moreover, Pierce did not believe that J.

Commerce Bank had become concerned with the amount of money outstanding to MPI. It had insisted that MPI reduce its debt to $12 million and that it stop taking out loans to finance J. Howard's personal spending. It is therefore unfathomable how Pierce would have been able to convince Texas Commerce Bank to nearly double MPI's line of credit to pay the amounts due under the note and the private annuity. Moreover, even if it had been able to borrow enough to pay the amounts due in 1996, Hunter testified that the private annuity would only be a good business decision for J. Howard if he lived for five years or more. Thus, MPI would have had to borrow nearly $50 million over five years to finance J. Howard's personal spending, at a time when its lender had reduced its line of credit from $15 million to $12 million. The testimony that the May 1995 transactions were legitimate and sound business decisions, undertaken at the behest of J. Howard, is contradictory and therefore not credible.

Howard had the capacity to make these decisions. On May 26, 1995, Pierce signed a Directors Consent stating that J. Howard no longer had the capacity to act as a director for MPI, and removed him from the MPI board. This made Pierce the sole director. (Ex. 3375.)

Even if the Court were to view Pierce's actions as good faith efforts to preserve his father's long-held estate planning wishes, which it does not, his actions still defy both the law and fundamental ethics. Beyond the legal questions that the Court has had to deal with, there are philosophical questions as to whether an elderly person has the right to spend his money as he chooses, even if he does so in a foolhardy way. Whatever his personal actions, J. Howard had earned his life's fortune, and Pierce never had the right to interfere with the way that J. Howard saw fit to spend it.

8. *Destroyed, Altered, Backdated, and Fraudulent Documents*

Pierce and Hunter's actions of slowly draining J. Howard of assets in order to prevent a gift to Vickie were egregious in nature. What is worse, however, is that many of the documents at issue in the case were destroyed, backdated, altered, or prepared and presented to J. Howard under false pretenses. This was done in order to prevent Vickie from receiving funds, out of fear that J. Howard might sign a will or other gift instrument at Vickie's behest, and to avoid the legal consequence of important dates in J. Howard's final years including his marriage to Vickie and the appointment of a guardian ad litem to manage his affairs.

The backdating and altering of the documents was done with the full knowledge of Pierce. Most of the backdated documents were prepared by Edwin Hunter, whose brilliant machinations on estate planning Pierce relied on to devise the necessary actions. Finally, many of the backdated documents were notarized by Scurlock who violated her oath by signing false notarial statements.

The documents subject to destruction, backdating, altering or false pretenses were:

i. The draft of the catch-all trust prepared by Hunter prior to his December 1992 meeting with J. Howard

As detailed in Part IV.C.1, *supra*, the evidence shows that Hunter prepared a "catch-all" trust prior to his December 1992 meeting with J. Howard, that was a mechanism for J. Howard to give a substantial gift to Vickie. That document was never produced by Hunter.

ii. The Grantor Retained Annuity Trust (GRAT) (Ex. 3293)

This document was originally signed by J. Howard on August 25, 1993, and held 47,288 shares of MPI. The document was altered by Hunter in March 1994.

In early 1994, Harvey Sorensen, who was responsible for filing tax returns for MPI, pointed out to Hunter that the copy of the GRAT that he had received in September 1993 was not qualified to hold shares of a subchapter "S" corporation under the Internal Revenue Code, and therefore MPI's subchapter "S" election was in jeopardy. Although Hunter responded that it complied with an IRS

Private Letter Ruling (*see* Ex. 133), he simultaneously directed Cherry Doucet to revise the GRAT. Doucet prepared revisions of the GRAT on March 2, 1994. (Ex. 649, p. 11.) Page two of the GRAT was then substituted. (Ex. 281, Sorensen letter stating his conclusion that the GRAT had been altered.) The revised GRAT added the following sentence to paragraph four of the GRAT: "Grantor may substitute property of equivalent value for the original trust corpus." (*Compare* Ex. 245 with Ex. 3293.) Because the substituted sentence added a line to page two, another line had to be deleted from the page so as to not disturb other pages, including the signature page. Paragraph 10(a) of the GRAT defined the Trustee's powers "[t]o sell at public or private sale . . . real estate . . . ." (Ex. 245.) The superfluous words "at public or private sale" were deleted, eliminating a line from paragraph 10(b), allowing the revised page two to be inserted in place of the original. (*Compare* Ex. 245 with Ex. 3293.)

Hunter then sent the revised pages to Sorensen. (Ex. 281.) Sorensen believed at first that the page was substituted and refused to sign the tax return until he had gotten an explanation from J. Howard or Hunter. Sorensen later called J. Howard's office and was told by Eyvonne Scurlock and Edwin Hunter that there had been a "miscollation" because everyone was in a hurry because of J. Howard's impending marriage. (Exs.316, 317.) The alteration of this document demonstrates Hunter's practice of altering documents.

iii. The Donation of the GRAT to the Living Trust (Ex. 268)

The document purports to be dated January 13, 1994. However, Hunter's Billing records indicate that on July 12,

1994, Cherry Doucet of the Hunter Firm "[d]rafted donation of interest in GRAT." (Ex. 649, p. 103, # 7533.) The document also purports to be notarized on January 13, 1994, by Scurlock, yet Scurlock's Notary Book does not include a record of notarizing the document. (Ex. 676.) The GRAT originally provided that if J. Howard died prior to its expiration in 1998, 99% of the MPI shares that it owned would revert to J. Howard's estate, which Pierce and Hunter feared would go to Vickie through a "clandestine California will." By transferring the ownership of the GRAT from J. Howard to the Living Trust, they hoped to insulate the GRAT from ever passing MPI stock to Vickie.[40] Additionally, by backdating the document, they would insure that it had not been transferred to Vickie while J. Howard was in California.

iv. The Promissory Note to MPI, the Pledge, and Assignment of the Pierce Note (Exs.287-289) all of which are dated June 1, 1994

These three documents were in fact signed on July 13 or 15, 1994. Hunter's billing records show that Cherry Doucet of the Hunter Firm "[d]rafted pledge and assignment; Drafted promissory note" on July 11, 1994. (Ex. 649, p. 103, # 7535.) There is no record of a meeting with Pierce or J. Howard to sign these notes on June 1, 1994, or records indicating that Hunter prepared these documents prior to June 1, 1994. Hunter's Fine Tuning Memo, which was drafted after J. Howard's June 27, 1994 marriage to

[40] In May 1995, Pierce and Hunter arranged to sell the GRAT's MPI shares back to MPI for cash, to make absolutely certain that Vickie would never have any MPI stock.

Vickie, indicates that these transactions should occur in the future. (Ex. 310a, p. 6, VII.A.4.) The documents also purport to be notarized on June 1, 1994 by Scurlock, yet Scurlock's Notary Book (Ex. 676) does not include a record of notarizing the documents on June 1, 1994, or at any date thereafter. As noted, *supra,* these documents allowed Pierce, at his discretion, to stop the flow of income from J. Howard, and instead re-direct the payments to MPI. Because the income would have been community property, Vickie had an interest in these notes after she married J. Howard, and thus the backdating deprived her of that interest without her involvement. Additionally, the documents effectively eliminated J. Howard's ability to give or bequeath to Vickie the August 25, 1993 Pierce Note, as it was encumbered by the note to MPI.

v. The Amended and Restated Living Trust of July 13, 1994

The Amended and Restated Living Trust dated July 13, 1994 had key pages substituted. Donald J. Fandry, a forensic document expert, undertook an extensive examination of this document. (AP 023175-023206.) Fandry found that page two was added to the Amended and Restated Living Trust after the date of July 13, 1994. According to Fandry, the second page, where the Living Trust was made irrevocable has a different type of paper with no watermark, whereas the other pages all contain a watermark, "Eatons Eminence bond U.S. Berkshire."

Additionally, Fandry found that the printing on this second page is also a different type of printing process indicating that it was printed at a different time and/or on a different printer. The toner spattering, when inspected under a microscope revealed that the toner is much

broader on the watermarked pages. The toner spattering on page two is much cleaner, meaning less spattering of toner.

Finally, Fandry found that the staple hole patterns do not match other pages indicating that pages were substituted subsequent to the initial completion of the document.

Fandry also found that page three of the living trust was substituted. According to Fandry, the staple holes on page three also show a marked discrepancy with other pages. As an example, there are significantly less staple holes on page three than page four. The indentations of the staple wire patterns are not consistent with other pages. The holes and indentations do not line up.

Another expert, J.L. Hale, Jr., reviewed the Amended and Restated Living Trust Document and came to similar conclusions as Fandry. (Ex. 686.) Hale confirmed that page two has no watermark, that the staple patterns are different from the other pages, and that it was printed with a different quality printer. Hale also points out that page three has staple hole patterns that are inconsistent with the rest of the document. In addition, Hale notes that the watermark on page three is upside-down, indicating that it was inserted into the document at another time than the other pages. According to Hale, "Page 2 was inserted to replace a different page at some point . . . [and it] is patently obvious that page 3 was inserted at some point to replace a different page." (Ex. 686.)

Based on this analysis, and the Court's own review, the Court agrees with both Fandry and Hale that pages two and three were substituted. Pages two and three include Article III, which reads as follows:

This trust shall be irrevocable. The Settlor expressly reserves the power to substitute E. Pierce Marshall, Elaine T. Marshall, or any § 170(b)(1)(A) organization for the beneficiary of any established in the instrument. For the purposes of this Article III, the term "§ 170(b)(1)(A) organization" shall have the meaning attributable to it by the Income Tax Regulation § 1.170 A-G.

Further, Settlor expressly reserves the right to reduce any distributions set forth in Article VI, Paragraph B, any such reduction increasing the portion of the trust estate under Article VI, Paragraph C. Settlor shall exercise these powers by notarial act.

Except as provided in this Article III, the Settlor shall have no power to alter, amend, modify or change this trust indenture.

All statements or references to the Trust being irrevocable are set forth in Article III, which is contained entirely on pages two and three. These pages have been substituted due to intentional acts by Hunter, with the knowledge of Pierce. Moreover, there is no evidence, other than the self-serving statements offered by Pierce and Hunter, that J. Howard had ever before sought to make the Living Trust irrevocable, despite numerous opportunities to do so in the preceding ten years. The trust provisions were read to J. Howard, and the pages containing the irrevocable clause were substituted after the document was executed. Because of these intentional acts, the Court finds that [] the original pages set forth a revocable trust.

Fandry and Hale opine that not only does the Amended and Restated Living Trust contain substituted

pages, which J. Howard would not have seen, but that in fact, J. Howard's signature on page twenty-two of the document is forged. Fandry and Hale undertook significant handwriting analysis to determine that the signature of J. Howard was likely not genuine. Moreover, Hale found that the watermark on page twenty-two is also upside-down, corroborating his opinion that J. Howard's signature was forged.

These three pages are the most critical pages in the Amended and Restated Living Trust. Pages two and three make the trust irrevocable, while page twenty-two is the page on which J. Howard purportedly signed the document. These three pages are the only ones that have been drawn into dispute during the course of the litigation between the parties, and are the pages that served to insure that J. Howard could not make a substantial gift of his wealth to Vickie.

It is also clear from the record that the Amended and Restated Living Trust was not immediately recorded. Instead, it was kept in the possession of either Pierce, Hunter or Scurlock for four to six days, until July 19, 1994. At that point, the document was given to Townsend, who returned to Lake Charles with it and subsequently recorded it in Glasscock County, Texas on July 21, 1994.

The testimony of Hunter and Pierce border on a concession of substitution of these pages. The explanation offered by Hunter is that possibly J. Howard himself substituted these two critical pages. There is absolutely no testimony or evidence of anything that approaches this ludicrous speculation. The suggestion that J. Howard, who had just had this document read privately to him by Hunter, subsequently got his hands on the document and

attempted to read the unreadable and then went to a word processor and typed out these new pages and stapled them together is unbelievable. Furthermore, the evidence shows that, up until the time of his death, J. Howard believed the Living Trust was revocable. *See* Part IV.D.5, *supra.*

vi. The Sale for Private Annuity (Ex. 3370)

As detailed, *supra,* this document was signed under false pretenses. Under the terms of the document, in May 1995, J. Howard sold to MPI his remaining shares of MPI stock for an annuity that would not begin paying until March 1996. Hunter represented that this would be a sound business investment if J. Howard lived another five years. However, at the time, J. Howard had been extremely ill and had been hospitalized three times in the previous five months. His health was so poor in January that Townsend began looking into funeral arrangements. Even to the extent that J. Howard recovered after January 1995, it was clear that J. Howard, then ninety years-old, would not live for five years, as he had been diagnosed in April 1995 with terminal stomach cancer.

This document is also a case of self-dealing. Pierce signed the document as co-trustee of the living trust and as President of MPI. Thus, he was improperly involved on both sides of the transaction. Moreover, Pierce was the only one that stood to benefit from the sale. By May 1995, Pierce had become the primary shareholder of MPI. He also stood to receive any outstanding shares then owned by his mother, Eleanor, as the residual beneficiary of her charitable trust. Thus, by having MPI purchase J. Howard's remaining shares, he was becoming the sole shareholder of the company. He was able to do this without

paying anything to J. Howard since Pierce knew that J. Howard would not live to collect the proceeds of the annuity.[41] Furthermore, Pierce stripped him of his last remaining interest in MPI which he could have given to Vickie.

vii. The Renunciation of J. Howard's right to receive distributions from the Living Trust (Ex. 145)

Acting under his power of attorney, Pierce purportedly signed this document for J. Howard on December 28, 1994. However, as demonstrated in Part IV.D.6, *supra,* that claim in not credible and the document is irregular on its face. Pierce's signature purports to be notarized by Eyvonne Scurlock, but there is no such record in her notary book. (Ex. 676.) Moreover, Finley Hilliard's signature as a

[41] There is some evidence that this document, and the entire series of documents executed in late May 1995, may have been backdated. The Charitable Lead Trust is questionable on its face, as it purports to be dated on May 29, 1995, but is notarized by Scurlock three days earlier, on May 26, 1995. (Ex. 99.) Once again, Scurlock's notarization is in question, as there is no May 26, 1995 entry in her notary book. (Ex. 676.) Additionally, Hunter's billing records indicate that his partner, Glynn Blazier, was researching: "requirements of qualified lead annuity trust; Prepare draft documents" on July 12, 1995. (Ex. 3344, p. 80.) Additionally, Pierce had strong motivation to backdate the documents to May 26. On May 31, 1995, Glenn Johnson was appointed J. Howard's temporary guardian ad litem, thus any documents relating to his assets signed after that time might be called into question. The motivation to falsify, the irregularities of the document, the use of a discredited notary, work that appears to relate to the document after it was purportedly signed, and the pattern that Pierce, Hunter and Scurlock have demonstrated in falsifying and backdating documents give strong indication that these documents were also backdated. However, the evidence on this point is not as clear as the evidence of backdating of the other documents, and is unnecessary to this Court's findings.

co-trustee of the Living Trust was not notarized until February 22, 1996, more than six months after J. Howard's death. (Ex. 145.) The document may have been signed in Spring 1995, as part of Pierce's plan to cut Vickie off or in February 1996, after J. Howard's death. Although the Court cannot determine with certainty the date the document was actually signed, it does conclude that it was not signed in December 1994. This left J. Howard without the right to collect any income from his primary assets contained in the Living Trust, and he would therefore be unable to give any of it to Vickie. It also effectively cut-off Vickie's rights to demand payment from the Living Trust.

viii. The Co-Trustees Resolution, purportedly dated February 7, 1995, that resited the trust from Houston, Texas to Calcasieu Parish (Lake Charles), Louisiana (Ex. 341)

Hunter's billing records indicate that work began on changing the situs of the trust on May 31, 1995. (Ex. 3344, p. 64.) On that day, Hunter spoke to Hilliard and Townsend about the issue. (Id.) He then had a conference with his partner Tim O'Dowd on the issue. (Id.) O'Dowd researched the issue on May 31 and June 1, 1995. (Id.) On June 5, 1995, O'Dowd wrote to Pierce on the issue. (Ex. 3344, p. 65.) On June 6, 1995, O'Dowd drafted "Resolution of Trustees for change of situs." (Id.) Thus, although the resolution purports to be dated February 7, 1995, it was in fact executed after June 6, 1995. By re-siting the Living Trust to Louisiana, Vickie would lose the ability to control the venue of the litigation, in favor of what Pierce and Hunter considered a more favorable "hometown."

V. FINDINGS PROPOSED BY THE BANKRUPTCY COURT

Except to the extent that they are inconsistent with the findings of fact set forth in this order, this Court's de novo review upholds the findings of fact proposed by the bankruptcy court in its October 6, 2000 Original Decision, *Marshall I*, 253 B.R. 550.

CONCLUSIONS OF LAW

I. CAUSE OF ACTION FOR TORTIOUS INTERFERENCE WITH AN *INTER VIVOS* GIFT[42]

The bankruptcy court found that Pierce tortiously interfered with Vickie's expectancy of an *inter vivos* gift. The Texas Supreme Court [43] has never ruled on whether Texas recognizes a cause of action for tortious interference with an *inter vivos* gift. *See Brandes v. Rice Trust, Inc.*, 966 S.W.2d 144, 146 (Tex.App.1998). In the absence of a settled rule of law enunciated by the highest court of the applicable state, a federal court should use its best judgment to

[42] When conducting a *de novo* review of the bankruptcy court's proposed findings of fact and conclusions of law, a district court must review "those matters to which any party has timely and specifically objected." 28 U.S.C. § 157(c)(1). Pierce filed his brief on the merits on June 25, 2001, and his amended assignments of error on June 27, 2001. Pierce did not object to the bankruptcy court's reading of Texas law. On January 8, 2002, Pierce filed an additional brief on Texas law. That brief was untimely and in contradiction of the Court's August 27, 2001 Order stating that "[b]ecause the parties have already briefed the merits, no trial briefs need be submitted." Accordingly, Pierce's January brief is STRICKEN. Nevertheless, the Court addresses the issue of law *sua sponte*.

[43] Neither side has contended that anything but the law of Texas applies. The Court therefore assumes without deciding that Texas furnishes the applicable law.

predict how the highest state court would rule. *Ins. Co. of the State of Pennsylvania v. Associated Int'l Ins. Co.*, 922 F.2d 516, 520 (9th Cir.1990). In such a situation, the federal court should look to the decisions of intermediate state courts for guidance. *Id.* "Indeed, state intermediate appellate court decisions are not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *Id.* (internal quotation marks and citation omitted).

Texas courts have recognized a cause of action for tortious interference with an inheritance. *King v. Acker*, 725 S.W.2d 750, 754 (Tex.App.1987) (citing *Tippett v. Hart*, 497 S.W.2d 606 (Tex.Civ.App.1973)). In finding that the tort existed, the court relied on the ancient maxim that the law will afford a remedy to every invasion of a legal right. *Id.* (citing *Chandler v. Welborn*, 156 Tex. 312, 294 S.W.2d 801, 807 (1956)); *accord Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L.Ed. 60 (1803). It therefore adopted the position of the Second Restatement of Torts, which creates a cause of action against "[o]ne who by fraud, duress, or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received." Rest.2d Torts § 774B (1977). By adopting this position, the Texas court concurred with courts in most jurisdictions that also recognize this tort. Rest.2d Torts § 774B, Reporter's Note (1982 App.).

Pierce suggests that *King* is inapposite because it involved interference with an inheritance, not, as the present case does, interference with an *inter vivos* gift. However, the court in *King* indicated that the Restatement was the proper rule. *King*, 725 S.W.2d at 754. The same

section of the Restatement that creates a cause of action for interference with an inheritance creates a cause of action for interference with a gift. *See* Rest.2d Torts § 774B. The same section should therefore be treated in the same manner. In the absence of a persuasive reason to the contrary, the Court is bound by the court's holding in *King* that Texas law adopts section 774B of the Restatement. *Associated Int'l Ins. Co.*, 922 F.2d at 520.

Pierce argues that public policy counsels against recognizing a tort for interference with a gift, because a thwarted donee can approach the donor to resolve the problem. While that is true as a general rule, in circumstances such as the present one, where the donor dies before the interference is discovered, the intended donee's sole remedy is with the courts. Indeed, public policy suggests that a cause of action for tortious interference with a gift is well founded. If a donor intends to give a gift to a donee during his lifetime, but is thwarted by the residual beneficiary of the donor's estate, equity demands that the heir not benefit from his wrongful conduct.

Accordingly, the Court's best judgment is that Texas law recognizes a cause of action for tortious interference with an *inter vivos* gift.

II. ELEMENTS OF TORTIOUS INTERFERENCE WITH AN *INTER VIVOS* GIFT

Although Texas law does not specify the elements of a cause of action for tortious interference with an expectancy, other jurisdictions have clearly delineated the elements. *See, e.g., Doughty v. Morris*, 117 N.M. 284, 871 P.2d 380, 384 (1994). A plaintiff must prove (1) the existence of an expectancy; (2) a reasonable certainty that the

expectancy would have been realized but for the interference; (3) intentional interference with that expectancy; (4) tortious conduct involved with the interference; and (5) damages. *Id.*

A. Existence of an Expectancy

J. Howard made numerous promises to Vickie that she would receive half of what he owned. These include promises on at least three occasions when he proposed to her: when J. Howard purchased the Tomball Ranch; when he purchased the 1992 Mercedes for her; and when he proposed to her in June 1994, which she then accepted. J. Howard made similar promises on other occasions in his proposals to Vickie and protestations of love for her. These promises are corroborated by J. Howard's pattern of wooing Lady Walker with his great wealth, and his proposals to Vickie were witnessed on at least one occasion by Harvey Sorensen.

Pierce argues that Vickie did not have a genuine expectancy of a gift because of various actions and public statements that she made. In particular, Pierce points to Vickie's appearance on the Howard Stern radio show two days before J. Howard's death. At that time, Vickie stated that she would not be getting anything from J. Howard's will. Not only is this statement technically correct, but it was made as part of a public relations campaign. As Vickie testified to in this Court, she did not want people to think that she had married J. Howard only for his money, as that appearance would harm her public persona and detract from her acting and modeling career. It is therefore entirely reasonable that she misled Howard Stern to improve her public image.

As set forth above, while Vickie may have thought he was prepared to give her half of everything he owned, Vickie's objectively reasonable expectancy, and the amount that J. Howard intended to give her, was half of his "new community." This term was defined by J. Howard as one-half of the growth of his assets during the time of their marriage.

The expectancy is also corroborated by the fact that J. Howard conferred on several occasions with his attorney about ways to make a substantial gift to Vickie, that would provide her with money after his death. This included several potential pre-nuptial agreements that contained gift clauses, his direction to Hunter to draft a "catch-all" trust, and his direction to Sorensen to create a legally enforceable gift of one-half of his new community. It is further corroborated by his knowledge that Vickie's career might be short-lived and he believed her to be "unteachable," so it would be necessary to provide for her in retirement.

B. Reasonable Certainty of Realization But For Defendant's Conduct

A plaintiff must establish that there is a reasonable certainty that the gift would have been realized but for the defendant's conduct. The Comment to the Restatement notes that "complete certainty is impossible. It is not required." Rest.2d Torts § 774B, cmt. d. (1977). Instead, the Restatement requires only "proof of a high degree of probability that the" donor would have made the gift absent the defendant's conduct. *Id.* Moreover, "[t]he fact that it was the defendant's tortious act that makes it not possible to prove with certainty may be taken into consideration by the court." *Id.*

Here, Vickie has introduced evidence that shows a high degree of probability that J. Howard would have made a gift to Vickie. He directed two attorneys to prepare documents giving her a substantial gift as early as fall 1992. Although the gift was not feasible at that time due to the gift and generation-skipping tax burdens, there is no evidence that J. Howard ever retreated from his intention to give a gift to Vickie. Once he married her, the gift and generation-skipping tax consequences disappeared, and J. Howard would have been able to make a substantial gift. The evidence shows that through the very end of his life, Vickie was the most important person to J. Howard. Pictures of them together during Christmas 1994 show an elated J. Howard. Tape recorded statements made by J. Howard in May 1995, less than two months before his death, demonstrate that he still believed that Vickie was "the light of his life," that she had "saved his life," and that he wanted her "to be supported by" him. (Ex. 364.) [] His actions seeking to have children with Vickie, either by adopting her son or by conceiving on their own, demonstrate that his commitment to provide for her only increased over time. Indeed, it was J. Howard who aggressively gave money to Vickie. He gave her more than anything she had explicitly asked for.

The evidence also demonstrates that it was Pierce's tortious conduct that makes it impossible to prove with certainty that the gift would have been realized. J. Howard placed a tremendous amount of trust in Pierce and Hunter who participated in acts intentionally designed to prevent J. Howard from giving Vickie a substantial gift or to undermine any will or gift that J. Howard signed when he was out of their presence. They presented documents for his signature which he was unable to read and signed

documents on his behalf. Had they acted according to his frequently stated wishes, rather than to protect Pierce's interest in MPI and the valuation of Koch Industries, there is a high probability that J. Howard would have made a substantial gift to Vickie.

C. Intentional Conduct

The evidence shows that Pierce and Hunter began undertaking estate planning transactions for J. Howard soon after they learned that he was seeking to make a substantial gift to her. All of these transactions were intended to drain J. Howard of his assets. Pierce's actions were intended to prevent a gift from being made to Vickie so as to not undermine the low valuations accorded to MPI and Koch stock. Allowing Vickie to have a gift based on the value of Koch stock could undermine his litigation position on the value of Koch stock with the dissident Koch shareholders and the IRS on gift and estate taxes. This would cost Pierce millions of dollars in tax litigation, and potentially endanger the liquidity of MPI. Thus, Pierce's actions were all made with the intention of preventing J. Howard from making a gift to Vickie.

D. Tortious Conduct

A defendant's conduct must be "independently tortious in character." Rest.2d Torts § 774B, cmt. c. Evidence of Pierce's tortious conduct is legion. Acting in concert with Hunter, they backdated documents, altered documents, destroyed documents, suborned falsified notary statements, presented documents to J. Howard under false pretenses, and committed perjury.

E. Damages

1. Entitlement

Vickie was damaged in the amount that J. Howard intended to give her. In December 1992, J. Howard told Harvey Sorensen that he wanted to give Vickie one-half of his "new community." (Ex. 62.) "New community" was a term J. Howard had developed, originally related to his marriage to Betty. He wanted Vickie to share in the growth of the assets that he owned and controlled during the time of their marriage. (Ex. 62.) The primary asset he held was his interest in Koch stock, held through MPI.

MPI holds 862,535 shares of Koch common stock, and has held that stock since at least the late 1980's. Prior to August 1993, when Pierce's string of estate planning changes began, J. Howard owned 164,252 shares of the then 236,440 outstanding shares of MPI stock, or approximately 69.5% of MPI. Vickie is therefore entitled to 69.5% of the appreciation in value of the 862,535 shares of Koch stock between the date that she and J. Howard married on June 27, 1994 and his death on August 4, 1995.

Vickie argues that she is entitled to the appreciation in the value of those shares from December 22, 1992, the date the "New Community Memo" was sent. Vickie claims that memo represented a present intent on J. Howard's part to make a gift to Vickie. However, there is no question that the new community that J. Howard referred to was not actually created until J. Howard married Vickie.

The bankruptcy court awarded Vickie the appreciation from June 1994 to August 1999. Here, the ending date is less clear, because J. Howard's intent was to provide for Vickie in her retirement. Indeed the "New Community Memo" did not envision her being able to redeem the

warrants from MPI until 15 years after J. Howard and Eleanor died. Although J. Howard has passed on, Eleanor still lives a vibrant and active life, and the end-date is therefore unascertainable. That, however, cannot serve to benefit Pierce, as equity will not allow a tortfeasor to gain by his own tort. The ending date chosen is necessarily somewhat arbitrary. However, August 1999, just before the trial in this matter, is completely disconnected from J. Howard's intent. August 4, 1995 is a more appropriate date, as that is the date that Vickie's and J. Howard's "new community" ended.

Pierce cites *Jensen v. Jensen*, 665 S.W.2d 107 (Tex.1984), for the proposition that, under Texas law, the appreciation in value of separate property held during marriage remains separate property. Pierce's argument, however, misses the mark. While that is an accurate statement of the law, it is not an accurate statement of the issues involved in this case. Had the appreciation become community property under Texas Law, Vickie would be entitled to half regardless of any tortious activity by Pierce. Here, however, the appreciation is relevant because J. Howard intended to give to Vickie a gift, from his separate property, of half of the appreciation of Koch stock. Pierce's argument is therefore unavailing.

2. Valuation

Determining how much the stock in Koch Industries appreciated between June 27, 1994 and August 4, 1995 is an even more difficult task. Koch is a privately held corporation, thus the Court cannot determine the value based on market trades. Litigation over the value of Koch Industries has consumed the time of many of the individuals involved

in this case. Indeed, at one point in 1993, Merrill Lynch estimated that the value of Koch Industries was anywhere between $31.06 per share and $2,391.30 per share. (Ex. 681.)

Placing a value on a privately held corporation in general is a difficult task. Moreover, the Koch philosophy is vastly different from most businesses. Koch gives an extremely low rate of return to its shareholders in dividends, allowing the company to grow more rapidly. While that significantly reduces the present share value, it substantially increases the future value of the stock. The experts here have proffered testimony wildly at odds with each other.

i. Mike Hill

In the bankruptcy proceedings, Pierce offered the expert testimony of Mike Hill to show the valuation of MPI. This testimony was stricken by the bankruptcy court as a sanction for Pierce's discovery abuses, but is considered by this Court. Hill utilized the dividend yield method to calculate MPI's value. According to Hill, this was necessary because of the "onerous minority shareholder oppression options available to majority shareholders domiciled in the State of Kansas (like Koch . . .)." (AP 017175.) However, by using the dividend yield method, the per share value of a company like Koch – that issues a very small dividend and reinvests its profits – is lower than its "inherent" value.

According to Hill, the per share value of MPI[44] as of the date J. Howard and Vickie married was $31,613,322.10. (AP 017180, 017187.) As of J. Howard's death, Hill valued MPI at $29,703,096.75. Hill's valuation would therefore entitle Vickie to no compensatory damages.

ii. Wayne Elggren

Vickie presented Wayne Elggren as an expert on valuation. Elggren employed the guideline company method, whereby Koch's value was determined by reference to similar public companies in the field. Elggren did not calculate the value of MPI or Koch as of August 4, 1995. Elggren calculated the appreciation of J. Howard's approximately 70% interest in MPI from June 27, 1994 to August 30, 1999 (just before trial commenced in the bankruptcy court) at $899,508,268. The bankruptcy court awarded Vickie one-half of this amount, or $449,754,134, as compensatory damages.

iii. IRS Settlement

For several years, the Marshall family interests have been involved in various tax litigation matters with the IRS. The IRS has made an offer to settle those cases. (Ex. 3573.) That settlement includes an imputed value of MPI and Koch stock. These settlement offers provide an additional valuation for Vickie's share of MPI and Koch stock holding. Accordingly, the Court makes the following

[44] Hill valued MPI, not Koch Industries. However, because Koch Industries stock is the major asset of MPI, determining the growth in Koch Industries can be determined by reference to it. The fact that MPI did not appreciate suggests that neither did Koch.

calculations according to the values imputed by the IRS for Settlement purposes. (Ex. 3573, Schedule 9.)

On June 16, 1994, MPI had 222,535 shares of stock actually outstanding. The IRS value of MPI Voting Stock as of June 16, 1994 was $1,039.92 per share. Therefore, the IRS value of MPI as of June 16, 1994 was $231,418,597.20.[45] Because the IRS offer is premised on valuing MPI at 49% of the value of its Koch stock, the value of the Koch shares held by J. Howard through MPI can be set at $472,282,851.43 by dividing by 0.49.

On May 26, 1995, MPI had 208,470 shares of stock actually outstanding. The IRS value of MPI Voting Stock as of May 26, 1995 was $1,248.70. Therefore, the IRS value of MPI as of May 26, 1995 was $260,316,489. The value of the Koch stock held by J. Howard through MPI can therefore be set at $531,258,140.82

During the period of time covered by these transactions, MPI's interest in Koch appreciated by $58,975,289.39. The time period covered by these valuations is 344 days. Thus, the average daily appreciation of MPI's interest in Koch stock was approximately $171,439.79. J. Howard and Vickie were married during approximately this same period of time, and it is therefore fair to assume that the rate of appreciation during this period was approximately the same. By extrapolating the appreciation of the stock value during this time, the value

[45] The amount of outstanding voting and non-voting stock is not clear on the record. However, the voting stock is valued only slightly higher than the non-voting stock. Because of Pierce's tortious and wrongful conduct, the Court draws the inference against him and uses the higher value for its calculation.

according to the IRS settlement offer can be obtained. J. Howard and Vickie were married for 403 days. Thus, by multiplying the average daily appreciation of MPI stock during this period of time by 403 days, the Court finds that the appreciation in the value of MPI's interest in Koch stock was approximately $69,090,237.28.

Absent any fraudulent, wrongful, and tortious transactions, J. Howard would have owned 164,213 shares of MPI stock on June 27, 1994. Absent any fraudulent, wrongful, and tortious transactions, there would have been 236,600 shares of MPI outstanding as of June 27, 1994. Thus, on June 27, 1994, J. Howard would have owned approximately 69.4% of MPI stock. Absent any fraudulent, wrongful, and tortious transactions, J. Howard's ownership interest in MPI would have been identical at the time of his death on August 4, 1995.[46]

J. Howard's share of the appreciation in the value of MPI would therefore be approximately $47,952,304.03. Vickie is entitled to one-half of J. Howard's share of the appreciation of MPI's interest in Koch stock. Using the

[46] The IRS settlement offer reflects several sales of stock by J. Howard to Pierce and sale of stock to MPI to cancel J. Howard's outstanding debt to MPI after August 20, 1993. As set forth above, Pierce's tortious conduct began to effect J. Howard's estate planning transactions in August 1993. Thus, the transactions after that date are tainted by Pierce's fraud, and are discounted by the Court. However, the offer does reflect the distribution to Pierce of 160 shares of MPI stock as compensation. Because Pierce had been receiving MPI stock distributions as part of J. Howard's long-held estate planning, the Court does include that transaction in its calculation. Additionally, the offer reflects a gift by J. Howard to "EM, PM, PM" on December 28, 1993. Because these appear to be legitimate Christmas gifts to J. Howard's family members, the Court does include that transaction in its calculation.

IRS Settlement numbers, this amount would be $23,976,152.02.

Although the IRS settlement is a reasonable method for calculating damages, the Court considers it inequitable to do so because it was negotiated by Edwin Hunter. As detailed above, Hunter was a key player in Pierce's tortious interference and the Court has no confidence in his credibility. Accordingly, Pierce should not have the benefit of Hunter's efforts in this Court.

iv. Book Value

The book value of MPI's interest in Koch stock is recorded in two credit approval presentations to Texas Commerce Bank. (Exs. 684, 685.) These presentations show a value of MPI's Koch stock of $664.4 million as of December 31, 1994 (Ex. 685) and $780 million as of December 31, 1995. This shows an annual appreciation of $115,600,000 and an average daily appreciation of $316,712.33. Because these valuations were taken near the time of J. Howard's marriage and death, it is fair to assume that the average daily appreciation during this time was the same as that during J. Howard's marriage to Vickie. Thus, the Court can extrapolate the appreciation of MPI's interest in Koch Industries during their marriage at $127,635,068.49. As noted in Part II.E.2.iii, *supra*, J. Howard's ownership interest in this would be approximately 69.4%, or $88,585,534.67. Vickie would be entitled to one-half of this, or $44,292,767.33.

The Court returns to first principles. "Fair Market Value" is defined as "[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market in an arm's-length transaction." Black's Law Dictionary 1549

(7th ed.1999). Thus, while appraisers can estimate value, and several have attempted to do so in this case, the Court recognizes that the only real determination of value is when a sale takes place. Such a transaction ordinarily takes place after an often prolonged negotiation between buyer and seller, with each side attempting to create the best deal for themselves. Although no such situation presents itself in this case, resorting to the book value gives the Court some indication of the proper amount. The book value of the stock represented the collateral that MPI relied on for its line of credit. J. Howard and Texas Commerce Bank thought that book value was a sufficient valuation for regular business purposes. Pierce continued to rely on this when he took over MPI upon J. Howard's death. Indeed, the reports produced by Texas Commerce bank note that, as a privately held company, access to Koch's audited financial statement is limited and that historically the bank received updates of Koch's financial performance from Pierce. (Exs.684, 685.)[47] Accordingly, the Court accepts the book value of MPI as the appropriate measure of damages to be awarded to Vickie.

The Court finds itself in the quandary of finding that the facts are much more egregious than even the bankruptcy court suspected and found, yet awarding a substantially smaller amount of damages. However, the Court is

[47] Pierce contended at trial that based on the collateral of Koch stock, Texas Commerce Bank would agree to expand MPI's line of credit to cover the amount that it would owe to J. Howard between 1996 and 2001 for the sale of the Private Annuity, had he lived. That amount would be approximately $10 million per year, or $50 million between 1996 and 2001. Thus, if Pierce believed that Texas Commerce Bank was willing to extend MPI an additional $50 million line of credit, he must have also placed some reliance on the book value of MPI's Koch stock.

bound to the facts that show that Vickie is entitled to a smaller, but still substantial, award.

F. Punitive Damages

"On a showing in a tort action that a defendant acted willfully, maliciously, fraudulently, or with gross negligence, there may be a recovery of exemplary damages, in addition to compensatory damages." *King*, 725 S.W.2d at 755; *see also* TexCiv.Prac. & Rem.Code Ann. § 41.003 (Vernon 1997). Willful, malicious, and fraudulent conduct must be shown by clear and convincing evidence. TexCiv.Prac. & Rem.Code Ann. § 41.003(b). Here, the evidence of willfulness, maliciousness, and fraud is overwhelming. Pierce and Hunter engaged in a pattern of deceiving J. Howard for nearly two years. They presented documents under false pretenses, suborned perjured notary oaths, falsified and backdated documents, and altered documents, all with the intent of denying Vickie the gift that J. Howard intended to make to her. Pierce was the primary beneficiary of these acts. Pierce had private investigators follow J. Howard when he left Texas to visit Vickie. In support of their plans, Hunter considered abusing the high office of a federal judge. Pierce's conduct continued even after J. Howard was dead, as he participated in a plan to solicit a federal judge and appears to have altered the Renunciation document in February 1996.

Exemplary damages are levied against a defendant as punishment for outrageous behavior and malicious, fraudulent or other culpable conduct. *Trans. Ins. Co. v. Moriel*, 879 S.W.2d 10, 16 (Tex.1994). Like criminal penalties, the goal of punitive damages is to punish the defendant for his wrongful conduct. *Id.* Pierce now owns and

controls all of Trof, Inc., MPI's successor in interest, which includes all the interest in Koch Industries that J. Howard held. MPI was valued at more than $260 million by the IRS six years ago. Furthermore, he holds additional amounts of Koch stock that he received either from J. Howard or acquired in other ways through the years. He also apparently has other significant holdings from his past employment as CEO of Electron Corp., and other interests unknown to the Court. In short, Pierce Marshall is an extremely wealthy individual. Small and nominal amounts will do little to deter wrongful conduct, and a substantial sum is warranted for the pattern of malicious conduct that continued on for several years.

In determining the amount of punitive damages to award, the Court must consider the reprehensibility of the defendant's conduct and the harm inflicted on the defendant, *In re Exxon Valdez,* 270 F.3d 1215, 1240-41 (9th Cir.2001), as well as the defendant's wealth, to determine the appropriate level of punitive damages. Here, the level of misconduct is far worse than even the bankruptcy court, which awarded $25 million in punitive damages, believed was present. The alteration of documents was not limited to the living trust and the plans to interfere with the administration of federal courts were hidden until discovery was finally extracted. Only because the Court recognizes that the amount of punitive damages must have a rational nexus to the actual damage award does the Court limit the total award to a doubling of the actual damages.

Accordingly, the Court assess punitive damages in the amount of $44,292,767.33.

CONCLUSION

Any conclusion of law erroneously labeled herein as a finding of fact shall be deemed a conclusion of law. Any finding of fact erroneously labeled herein as a conclusion of law shall be deemed a finding of fact.

The Court finds and concludes that Vickie is entitled to judgment against Pierce on her counterclaim for tortious interference with an inter vivos gift, and awards compensatory damages in the sum of $44,292,767.33, plus costs of suit, plus punitive damages in the amount of $44,292,767.33.

IT IS SO ORDERED.

264 B.R. 609

United States District Court,
C.D. California.
In re Vickie Lynn MARSHALL, Debtor.
E. Pierce Marshall, Appellant,
v.

Vickie Lynn Marshall, Appellee.
Vickie Lynn Marshall, Cross-Appellant,
v.
E. Pierce Marshall, Cross-Appellee.
No. SA CV 01-97 DOC.
Bankruptcy No. LA-12510 SB.
Adversary No. 96-1838 SB.

June 19, 2001.

Robert E. Mangels, Joseph A. Eisenberg, Herbert A. Bernhard, Julia J. Rider, Jeffer, Mangels, Butler & Marmaro, Los Angeles, CA, G. Eric Brunstad, Jr. Bingham Dana, Hartford, CT, for E. Pierce Marshall.

Rex S. Heinke, Sheila S. Kato, Jessica M. Weisel, Jennifer C. Yang, Greines, Martin, Stein & Richard, Beverly Hills, CA, Philip W. Boesch, Jr., Boesch Law Group, Marina Del Rey, CA, for Vickie Lynn Marshall.

AMENDED *ORDER* REGARDING SUBJECT MATTER JURISDICTION AND WHETHER THE TORTIOUS INTERFERENCE COUNTERCLAIM IS CORE OR NON-CORE

CARTER, District Judge.

In this appeal from the bankruptcy court, a litigant who filed a proof of claim and an adversary complaint to determine the dischargeability of a debt allegedly owed to

him by the debtor challenges a judgment entered against him on a counterclaim brought by the debtor. The debtor also cross-appeals. For the convenience of the Court and the parties, the Court instructed the parties initially to brief only two threshold issues. These issues are whether federal courts lack jurisdiction over this matter because of the probate exception to federal jurisdiction and whether the counterclaim is a core or non-core matter.[1] The bankruptcy court below held that the probate exception does not bar jurisdiction in this case and that the proceeding is a core matter. For the reasons that follow, the Court agrees that federal courts may exercise jurisdiction over this matter, but reverses the bankruptcy court's determination that this is a core matter.

I.

BACKGROUND

Appellee and Cross-Appellant Vickie Lynn Marshall ("Vickie")[2] is the surviving widow of J. Howard Marshall II ("J. Howard, Sr."), who died on August 4, 1995. Vickie and J. Howard, Sr. were married on June 27, 1994, after two and a half years of courtship. At the time of their marriage, Vickie was 26 years old and J. Howard, Sr. was 89 years old. Vickie, also known as Anna Nicole Smith, is a figure of some notoriety because of her career as a model. Prior to their marriage, J. Howard, Sr. had assisted in developing her career. J. Howard, Sr. is also a figure of

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[1] The Court heard oral argument on these issues on May 7, 2001.

[2] As all the principals in the matters at hand share the same last name, the Court will refer to the parties by their given names, as is customary in cases involving family members.

some notoriety in his own right, as he was said to be either the richest or second-richest man in Texas at the time of his death. His wealth was held in several different ways, including a living trust, and the exact amount and location of his wealth at the time of his death appears to be disputed. It seems clear that he was worth at least $1.6 billion.

It is undisputed that J. Howard, Sr. lavished great sums of money on Vickie during their courtship and marriage. Nonetheless, he did not explicitly provide for Vickie in his will. However, according to Vickie, and as found by the bankruptcy court, J. Howard, Sr. promised Vickie that she would receive substantial wealth and be taken care of. J. Howard, Sr.'s sons from two former marriages, J. Howard Marshall III ("J. Howard, Jr.") and Appellant and Cross-Appellee E. Pierce Marshall ("Pierce"), contest whether J. Howard, Sr. ever made such promises.

The magnitude of the sums of money involved in J. Howard, Sr.'s estate has sparked intensely contested litigation on several fronts. First, some probate proceedings took place in Louisiana, but were dismissed some time ago. Second, the estate is currently going through probate in Texas. Trial in the probate proceedings has concluded, and the jury has returned a verdict, but apparently judgment has not yet been entered. Third, on January 25, 1996, a few months after J. Howard, Sr.'s death, Vickie filed for Chapter 11 bankruptcy here in the Central District of California.[3] This bankruptcy case engendered

[3] The bankruptcy court noted in one of its decisions that Vickie apparently filed for bankruptcy because, after not receiving an inheritance from J. Howard, Sr., she lacked money and also because a default

(Continued on following page)

two adversary proceedings with which this Court has had involvement. This Order refers to these two adversary proceedings as the "Hilliard adversary proceeding" and the "Pierce adversary proceeding."

The Hilliard adversary proceeding began in January 1998 when Vickie filed an adversary complaint against Finley Hilliard as trustee of the J. Howard Marshall Living Trust and as executor of the succession of J. Howard Marshall II, et al. On July 22, 1998, the Honorable William D. Keller issued an order withdrawing the reference to the bankruptcy court of this proceeding, which thereafter proceeded before Judge Keller. On March 10, 1999, Judge Keller stayed the proceeding, pending the outcome of either the Texas probate proceedings or the Pierce adversary proceeding.[4] On November 8, 1999, the proceeding was transferred to this Court.[5] The proceeding remains stayed.

The appeal currently before the Court concerns the Pierce adversary proceeding. This proceeding began in

judgment had been entered against her on claims brought by her former personal assistant or housekeeper. This claim subsequently settled.

[4] Judge Keller made this ruling in an order entered in case number CV 98-7686 WDK, which was the case number assigned to Pierce's original motion to withdraw the reference of the Pierce adversary proceeding.

[5] When it began its existence as an adversary proceeding in the bankruptcy court, the Hilliard adversary proceeding had adversary number AD 98-1159 SB. After the reference was withdrawn but while the Hilliard adversary proceeding was still before Judge Keller, the proceeding had case number CV 98-4398 WDK. After being transferred to this Court, the Hilliard adversary proceeding was assigned case number SA CV 99-1372 DOC. This is the current, operative number for the Hilliard adversary proceeding.

1996, a couple of years prior to the instigation of the Hilliard adversary proceeding. On May 7, 1996, Pierce filed an adversary complaint seeking a determination that Vickie owed him a debt that was nondischargeable. Pierce alleged that Vickie had defamed him when, prior to the time she filed for bankruptcy and with her complicity, some of her lawyers told members of the press that Pierce had used forgery, fraud, and overreaching to gain control of Howard's assets.[6] On June 11, 1996, Pierce filed a proof of claim in the bankruptcy case. He made the claim by attaching a copy of the complaint from his adversary proceeding.

Vickie responded to both the adversary complaint and the proof of claim. As to the adversary proceeding, on June 14, 1996 she answered, in part asserting truth as a defense. She also asserted counterclaims for fraudulent transfer, an injunction, conversion, tortious interference with inheritance, breach of fiduciary duty, abuse of process, fraud, promissory estoppel, breach of contract (third-party beneficiary), the imposition of a constructive trust, an accounting, and indemnity and contribution. As to Pierce's proof of claim, Vickie filed an objection on July 3, 1996.

On September 22, 1998, Pierce filed a motion to withdraw the reference for his adversary proceeding. This motion was assigned to Judge Keller for determination. Judge Keller issued a ruling on October 21, 1998, but he

[6] Debts based on "willful and malicious injury," such as intentional torts, are not dischargeable. 11 U.S.C. § 523(a)(6). Damages for libel or defamation are not dischargeable when the statements were published with knowledge of their falsity. *Wheeler v. Laudani*, 783 F.2d 610, 615 (6th Cir.1986).

then vacated that order and issued a new ruling on March 10, 1999. The March 10, 1999 ruling denied Pierce's request to withdraw the reference. The effect of this ruling was that the Pierce adversary proceeding remained in the bankruptcy court in its entirety.[7]

On November 5, 1999, the bankruptcy court granted summary judgment for Vickie on Pierce's claim. It found that Vickie had published no statements about Pierce, had not ratified any statements about Pierce made by her attorneys, and was not otherwise vicariously liable for any statements her attorneys had made about Pierce. Thus, it held that Vickie had not committed a willful or malicious act under 11 U.S.C. § 523(a)(6).

Vickie's counterclaims against Pierce went to trial in the bankruptcy court in the fall of 1999. Approximately ten months later, on September 27, 2000, the bankruptcy court issued a Memorandum of Decision Following Trial ("Original Decision"). The Original Decision held that Pierce tortiously interfered with Vickie's expectation of the inheritance she otherwise could have received through a widow's election. On October 6, 2000, the bankruptcy court issued an Amended Memorandum of Decision Following Trial ("Amended Decision"), which supercedes the Original Decision. *See In re Vickie Lynn Marshall*, 253 B.R. 550 (Bankr.C.D.Cal.2000). Based on the evidence at trial and in large part on facts found against Pierce as sanctions for his discovery abuses, the Amended Decision concludes not

[7] Judge Keller's March 10, 1999 order refers the Pierce adversary proceeding in its entirety back to the bankruptcy court. Specifically, the order states without limitation, "This Court's October 21, 1998 Order is vacated. Accordingly, Case No. CV 98-7686, *In re Vickie Lynn Marshall*, is referred back to the Bankruptcy Court."

that Pierce tortiously interfered with Vickie's expectation of an inheritance, but that he interfered with her expectation of an *inter vivos* gift. Specifically, the Amended Decision states:

> The court finds that Vickie had an expectancy to receive a substantial portion of J. Howard's wealth. J. Howard repeatedly told her that she would receive half of what he owned. While J. Howard never made a will with any provision for her, this was because his principal assets were already in the Living Trust. J. Howard's plan was to provide for Vickie from the Living Trust.
>
> In December, 1992 J. Howard instructed both Sorensen and Hunter to arrange a gift to Vickie from the Trust. J. Howard instructed Hunter, a tax and estate planning expert, to prepare a "catch-all trust" for Vickie. A few days later J. Howard instructed Sorensen to prepare the documents for a gift to Vickie of one-half of the future appreciation in J. Howard's interest in MPI stock.[8] No evidence has been offered that these instructions were ever rescinded.

Am. Decision at 7. After discussing the certainty of the gift and Pierce's tortious conduct to prevent it, the Amended Decision then concludes:

> Pierce has tortiously deprived [Vickie] of her expectancy of a substantial *inter vivos* gift from her deceased husband J. Howard.

[8] MPI, or Marshall Petroleum, Inc., is a privately held corporation that in turn owns stock in Koch Industries, Inc., an oil and gas corporation affiliated with the Marshall family.

> The court awards damages in the amount of $449,754,134, less any amount that Vickie actually recovers in the pending Probate Court action in Texas. In addition, Vickie is entitled to punitive damages in an amount that remains to be determined after her actual damages are calculated.

Am. Decision at 9.

Pierce then filed a motion to withdraw the reference, assigned to this Court for determination. Just prior to argument on that motion, the bankruptcy court issued a third order on November 21, 2000. This decision, the Supplemental Memorandum of Decision Following Trial ("Supplemental Decision"), does not supercede the Amended Decision, but instead supplements it by explaining that the bankruptcy court had determined that Vickie's counterclaims were core proceedings and by imposing punitive damages of $25 million. It requested further briefing regarding certain forms of injunctive relief requested by Vickie, discussed requests by the parties for revisions to its findings of fact and conclusions of law, and set a hearing for December 6, 2000.

This Court heard oral argument on Pierce's motion to withdraw the reference on December 11, 2000 and then took the matter under submission. It then requested further briefing regarding the jurisdictional issue raised by Pierce in his motion.

On December 29, 2000, the bankruptcy court issued an Order on Motion for Entry of Judgment ("Order Re Judgment"). In this order, the bankruptcy court addressed Pierce's contention that the probate exception bars federal jurisdiction over Vickie's counterclaim. The bankruptcy

court rejected this contention. It held that Pierce had waived any objections to jurisdiction and had consented to jurisdiction by filing a proof of claim. Further, it held that in any event, the counterclaim did not fall within the exception, assuming the exception applies to bankruptcy cases. The bankruptcy court also provided further explanation as to why it had determined the matter is a core bankruptcy matter. Finally, the bankruptcy court ruled that it was appropriate to enter final judgment. The bankruptcy court entered a final judgment that day. This appeal followed.

Before considering the appeal, this Court denied as moot Pierce's motion to withdraw the reference, in addition to several motions for leave to file interlocutory appeals filed by Pierce.

II.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 158(a)(1), because the bankruptcy court has entered a final judgment in this adversary proceeding.

The Court reviews the bankruptcy court's legal conclusions *de novo*. Both subject matter jurisdiction and whether a proceeding is core or non-core are legal questions over which the Court exercises *de novo* review. *In re Castlerock Properties*, 781 F.2d 159, 161 (9th Cir.1986) (exercising *de novo* review over jurisdiction question, including core or non-core classification).[9]

[9] Vickie notes that a treatise submitted by Pierce as an exhibit states that unless the district court, on a motion to withdraw the

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If the Court determines that this is a core matter, it will then review the rest of the bankruptcy court's decision for abuse of discretion. If the Court determines that this is a non-core matter, it will review all aspects of the bankruptcy court's decision, including its factual findings, *de novo*. In non-core matters, the bankruptcy court cannot enter final judgment, and thus if this matter is non-core, the bankruptcy court's decision will be treated as proposed, rather than final.

III.

DISCUSSION

Two issues are presented on this first phase of the appeal. First, whether the probate exception to federal subject matter jurisdiction applies to bankruptcy proceedings and if so, whether this matter falls within that exception. Second, whether this matter constitutes a core or non-core matter.

In resolving these issues, the Court need consider only the counterclaim actually decided, tortious interference

reference, makes the determination that a proceeding is core or non-core, the bankruptcy court's determination "will be binding, subject only to conventional appellate review (if permission for interlocutory review is granted under § 158(a)) under the 'clearly erroneous' standard." 1 *Norton Bankruptcy Law and Practice* 2d § 4.26, at 461. This passage is somewhat opaque, is not supported by any citations in the treatise, and is contradicted by the sentence immediately preceding it in the treatise, which states, "The ultimate determination that a proceeding is core is reviewed *de novo*, like other jurisdictional findings." *Id.* at 460. The Court will follow the Ninth Circuit's approach and review the core or non-core determination *de novo*.

with the expectation of an *inter vivos* gift,[10] rather than all of Vickie's counterclaims. The bankruptcy court issued no ruling in favor of Vickie on any of her other counterclaims, and thus they are not before the Court on this appeal.[11] The theory of the *inter vivos* gift counterclaim is that J. Howard, Sr. placed most of his assets in a living trust prior to his death and that he intended to set up, prior to his death, a structure whereby Vickie would be provided for out of that living trust.

A. Probate Exception

Initially, the Court rejects two of Vickie's arguments. First, Pierce has not waived his objection to federal subject matter jurisdiction. While it may be true that it is disfavored for a party to wait until it has lost a case and then assert a lack of subject matter jurisdiction, lack of subject matter jurisdiction is in general a non-waivable defect. Further, while the motion Pierce attempted to bring regarding subject matter jurisdiction was properly rejected by the bankruptcy court for being untimely filed, his answer to Vickie's counterclaim does attack the court's jurisdiction. That the answer does not explicitly use the words "probate exception" is not material, as his answer

[10] While this counterclaim is titled "Tortious Interference With Inheritance," in the body of the counterclaim it alleges interference with expectancies of "inheritance and/or gift." As indicated, the final decision of the bankruptcy court concerned interference with Vickie's expectancy of a gift from J. Howard, Sr. before his death.

[11] Apparently, at the beginning of the trial in the bankruptcy court, Vickie's attorney stated, "[I]n effect what we're seeking is interference with an inter-vivos gift, we're not seeking interference with inheritance rights because there were no assets left at the time that [J. Howard, Sr.] passed." Vickie's Appendix at 139:2-6.

was sufficient to alert the court and the parties to the fact that he challenged the court's jurisdiction.

Second, the Court rejects the idea that Pierce "consented" to jurisdiction by filing a proof of claim. The notion of jurisdiction by consent, sometimes referred to as jurisdiction "by ambush," was used in bankruptcy law in the past, but the Supreme Court's ruling in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) seems to contradict it. In addition, in so far as the issue is the actual subject matter jurisdiction of the federal courts, rather than just the bankruptcy court's power to enter a final judgment, such jurisdiction cannot be conferred by consent.

However, considering Pierce's jurisdictional objection on the merits, the Court rejects his position and concludes that federal courts, including both this Court and the bankruptcy court, may properly exercise jurisdiction over this matter.

It is commonly understood that the "probate exception" bars federal courts from probating a will. While at first glance this proposition may seem unremarkable, both the origin and scope of the exception are not entirely clear. As the Seventh Circuit has noted, "The probate exception is one of the most mysterious and esoteric branches of the law of federal jurisdiction." *Dragan v. Miller*, 679 F.2d 712, 713 (7th Cir.1982). In particular, the origins of the exception are rather murky. A historical explanation, involving the exclusive jurisdiction of the ecclesiastical courts in England at the time the Judiciary Act of 1789 was passed, is frequently proffered. *E.g.*, *Markham v. Allen*, 326 U.S. 490, 494, 66 S.Ct. 296, 298, 90 L.Ed. 256 (1946). However, there are potential problems with this explanation. *See*

Dragan, 679 F.2d at 713 (describing the historical explanation as "shoddy"). Further, the historical explanation does not offer a compelling reason or rationale for why the exception should be continued today.

Other possible explanations include the idea that probating a will is not a "case or controversy" within the meaning of Article III, or that the Tenth Amendment reserves probate matters to the states. *See Rice v. Rice Found.*, 610 F.2d 471, 475 n. 6 (7th Cir.1979) (Article III); *McCan v. First Nat'l Bank of Portland*, 139 F.Supp. 224, 228 (D.Or.1954) (Tenth Amendment), *aff'd*, 229 F.2d 859 (9th Cir.1956). These rationales may be more satisfying than the historical explanation as justifications for the probate exception today. However, the Supreme Court has never formally adopted one of these rationales. Also, these rationales conflict with authority that states that the doctrine is "judicially created." *E.g., Rice*, 610 F.2d at 474. If the doctrine stems from the Constitution itself, it is not judicially created.

It is also possible that while not being constitutionally compelled, the doctrine is a result of the principles of comity attendant to our federal system.

The lack of clarity surrounding the origin of the exception makes it difficult to resolve the threshold issue argued by the parties, which is whether the probate exception applies only to diversity jurisdiction or to all federal jurisdiction, including bankruptcy. As Vickie notes, nearly all of the cases applying or analyzing the probate exception arise under diversity jurisdiction. However, this fact alone does not resolve the question, because there are few non-diversity actions in which the issue could even arise. If the exception stems from a historical practice

embodied in the diversity jurisdiction statute, it perhaps would apply only to diversity jurisdiction. Similarly, if the exception is just a judicially created doctrine recognizing that the federal interests present in diversity cases are sometimes overshadowed by stronger state interests, it might not apply to cases in which the courts' subject matter jurisdiction derives from federal law, such as bankruptcy law. However, if the exception stems from Article III or the Tenth Amendment, it presumably would apply to any proceeding in federal court, regardless of the basis of the court's subject matter jurisdiction. *Cf. Sutton v. English*, 246 U.S. 199, 205, 38 S.Ct. 254, 256, 62 L.Ed. 664 (1918) ("[A]s the authority to make wills is derived from the states, and the requirement of probate is but a regulation to make a will effective, matters of strict probate are not within the jurisdiction of courts of the United States.").

Whatever the origin of the exception, the practical and structural considerations attendant to it in the diversity context seem equally likely to arise for any action in federal court, including bankruptcy matters. The legal certainty that is of extra importance when dealing with matters of inheritance, the specialized nature of probate law and the corresponding expertise of probate court, the idea that normally probate matters are of local concern only, and the judicial economy that stem from limiting litigation involving one decedent's estate to one forum, particularly the forum that has asserted *in rem* jurisdiction over the physical property of the decedent's estate, all are still of concern when dealing with bases of federal jurisdiction other than diversity.

Thus, it is the Court's opinion that the exception most likely applies to all matters in federal court, not just those

premised on diversity jurisdiction. However, the Court need not formally decide this issue, because even assuming the probate exception applies to this case, the counterclaim decided by the bankruptcy court does not fall within the exception.

In the leading Supreme Court case on the scope of the probate exception, the Court explained:

> It is true that a federal court has no jurisdiction to probate a will or administer an estate. . . . But it has been established by a long series of decisions of this Court that federal courts of equity have jurisdiction to entertain suits in favor of creditors, legatees and heirs and other claimants against a decedent's estate to establish their claims so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court.

Markham, 326 U.S. at 494, 66 S.Ct. at 298; *see also Sutton*, 246 U.S. at 205, 38 S.Ct. at 256 (stating that suits that can "be determined without interfering with probate or assuming general administration, are within the jurisdiction of the federal courts").

Here, the bankruptcy court did not assert jurisdiction generally over the probate proceedings for J. Howard, Sr. or take control over his estate's assets, which are a part of the *in rem* jurisdiction of the Texas court administering his probate proceedings. Thus, the probate exception would bar federal jurisdiction over Vickie's counterclaim only if such jurisdiction would "interfere" with the probate proceedings. *Markham*, 326 U.S. at 494, 66 S.Ct. at 298.

Pierce argues that the counterclaim interferes with the Texas probate proceeding because the issues addressed are similar or related. However, courts hold that a matter must be more than merely related to a probate proceeding to fall within the exception and hence not be within the power of a federal court. The Seventh Circuit has grouped federal courts' decisions regarding the probate exception into two categories. *See Rice*, 610 F.2d at 476. In the first of these categories, the test used is whether the claim rests on an assertion that the will is invalid. *Id.* In the second, the test used is whether under the law of the state administering the probate, the claim could be brought only in the probate court, as opposed to a state court of general jurisdiction. *Id.* The tests are not entirely distinct from each other and courts do not always identify if they are applying one or the other. In substance, both tests are frameworks for analyzing and answering the overarching question, which is whether the assumption of federal jurisdiction will interfere with state probate proceedings. The Ninth Circuit has never explicitly adopted either test.

Under the first test, Vickie's counterclaim for interference with her expectation of an *inter vivos* gift does not fall within the exception. It is uncontested that the counterclaim does not rest on an assertion that J. Howard, Sr.'s will is invalid. On the counterclaim, Vickie makes no assertion regarding the validity of J. Howard, Sr.'s will, which left nothing to her. Whether Pierce interfered with J. Howard, Sr.'s plans to make a gift to Vickie through a trust arrangement is a determination that can be made completely independently from a determination of whether or not J. Howard, Sr.'s will is valid.

Also under the second test, Vickie's counterclaim does not fall within the exception. On the counterclaim, the

bankruptcy court found that J. Howard, Sr. intended to give Vickie a gift before he died:[12]

> In December, 1992 J. Howard instructed both Sorensen and Hunter to arrange a gift to Vickie from the Trust. J. Howard instructed Hunter, a tax and estate planning expert, to prepare a "catch-all trust" for Vickie. A few days later J. Howard instructed Sorensen to prepare the documents for a gift to Vickie of one-half of the future appreciation in J. Howard's interest in the MPI stock.

Am. Decision at 7. The bankruptcy court further found that Pierce interfered with J. Howard, Sr.'s plans:

> [Pierce] fired Sorensen for the purpose of preventing him from arranging the gift to Vickie of the increase in value of the MPI stock, and he conspired with Hunter to prevent the preparation of the catch-all trust. . . . [H]e caused the altering of [a document created regarding J. Howard, Sr.'s living trust, of which Pierce and his family were the sole beneficiaries] by substituting a new second page of the document after its apparent execution to insert a provision that purported to make the Living Trust irrevocable.

Am. Decision at 8.

[12] The bankruptcy court's factual findings include findings imposed as sanctions for Pierce's discovery abuses. Whether or not these sanctions were warranted and whether or not the bankruptcy court's factual findings were correct are issues that are not before the Court on this phase of this appeal. The Court here considers the findings of the bankruptcy court only as part of its analysis of the nature of Vickie's counterclaim.

Texas law does not require that this counterclaim be asserted in the probate court. Under the Texas Probate Code, a court exercising original probate jurisdiction has exclusive jurisdiction over "applications, petitions and motions regarding probate and administrations." Tex. Prob.Code Ann. § 5(c) (Vernon 1980). Pierce makes no argument that Vickie's counterclaim falls within this provision. Over other matters, probate courts and Texas courts of general jurisdiction, which in Texas are called district courts,[13] have concurrent jurisdiction. For example, probate courts and district courts have concurrent jurisdiction over "actions involving an *inter vivos* trust." Tex. Prob.Code Ann. §§ 5(d), 5A(c)(2) (Vernon 1980). However, there is a further provision regarding matters, such as Vickie's counterclaim, that are within the concurrent jurisdiction of both the probate and district courts. "In situations where the jurisdiction of a statutory probate court is concurrent with that of a district court, any cause of action appertaining to estates or incident to an estate shall be brought in a statutory probate court rather than in the district court." Tex. Prob.Code Ann. § 5A(b) (Vernon 1980). Pierce contends that this provision means that Vickie's counterclaim could not have been asserted in a Texas district court because, in Pierce's view, the counterclaim is a matter "appertaining to" or "incident to an estate."

The Texas Probate Code defines "appertaining to estates" and "incident to an estate" to include:

[13] Texas state district courts are of course separate and distinct from the United States District Courts in Texas. Throughout this section of this order, "district court" refers to a Texas state court of general jurisdiction, not a federal court.

> [T]he probate of wills, the issuance of letters testamentary and of administration, and the determination of heirship, and also . . . all claims by or against an estate, all actions for trial of title to land and for the enforcement of liens thereon, all actions for trial of the right of property, all actions to construe wills, the interpretation and administration of testamentary trusts and the applying of constructive trusts, and generally all matters relating to the settlement, partition, and distribution of estates of deceased persons.

Tex. Prob.Code Ann. § 5A(b) (Vernon 1980). It is uncontested that Vickie's counterclaim does not fall into any of these specific categories except possibly the last, "generally all matters relating to the settlement, partition, and distribution of estates of deceased persons." However, this is not an exclusive list, and thus even a matter not falling within one of the specifically enumerated categories could nonetheless be appertaining or incident to an estate.

However, Texas case law confirms that Vickie's counterclaim, under Texas law, is not appertaining or incident to J. Howard, Sr.'s estate. Texas courts hold that "[a]n action is 'incident or appertaining' to an estate when the outcome will have a direct bearing on the assimilation, collection, and distribution of the decedent's estate." *Falderbaum v. Lowe*, 964 S.W.2d 744, 747 (Tex.App.1998); *see also Crawford v. Williams*, 797 S.W.2d 184, 185 (Tex.App.1990) ("Matters incident to an estate includes those matters in which the controlling issue is the settlement, partition, or distribution of an estate."). Here, Vickie's counterclaim is asserted against Pierce individually and makes no claim against the estate or even against the trusts existing at the time of J. Howard, Sr.'s death. In fact, Vickie's counterclaim is at least in part premised on

the theory that she is entitled to nothing either from the living trusts or from the estate itself. Her theory is that Pierce prevented J. Howard, Sr. from including her in the living trusts. Thus, it is entirely possible that the trusts, as currently structured, are legally valid but also that Pierce owes Vickie damages for preventing J. Howard, Sr. from structuring the trusts in another way.

The Texas cases cited by Pierce are inapposite because they concern claims regarding an estate itself, rather than against a person individually for actions taken prior to the decedent's death. *E.g., Bailey v. Cherokee County Appraisal Dist.*, 862 S.W.2d 581, 585 (Tex.1993) (holding that taxes accruing on estate property after death are a claim against the estate and that a suit to collect them is therefore "incident to an estate"); *Perfect Union Lodge No. 10 v. Interfirst Bank of San Antonio*, 748 S.W.2d 218, 221 (Tex.1988) (holding that the interpretation of a testamentary trust is "incident to an estate"); *In the Matter of the Estate of McGarr*, 10 S.W.3d 373, 379 (Tex.App.1999) (holding that an action seeking an inventory, accounting, and distribution of an estate was "appertaining to an estate"); *Crawford*, 797 S.W.2d at 185-86 (holding that an action for turnover of estate property, an accounting, a declaration that a will was void for undue influence, and distribution as if the decedent had died intestate had to be brought in the probate court); *Boman v. Howell*, 618 S.W.2d 913, 915-16 (Tex.Civ.App.1981) (holding that a suit seeking declaratory judgment regarding the construction of a will had to be brought in the probate court); *Thomas v. Tollon*, 609 S.W.2d 859, 860 (Tex.Civ.App.1980) (holding that a suit seeking division of an estate was "incident to an estate").

These cases nicely set forth the rule that claims for matters incident to an estate should be brought in the probate proceeding, but they do not address the underlying question of whether Vickie's counterclaim constitutes a matter "incident to an estate." Pierce assumes this to be true without providing authority or argument in support of his position.

Other cases demonstrate that Vickie's counterclaim is not "incident to an estate." In *Sobel v. Taylor*, 640 S.W.2d 704, 706 (Tex.App.1982), one child of a decedent sued his two siblings, also children of the decedent, for alleged misdeeds both as co-trustees of the decedent's trust before his death and as co-executors after the decedent's death. The allegations were similar to those Vickie has made against Pierce: mismanagement of the trust, fraud, and self-dealing. *Id.* The Court of Appeals of Texas held that the suit was not "incident to an estate," and therefore could proceed independently in the district court, rather than the probate court, because the alleged actions occurred prior to the decedent's death and because the damages sought were from the co-trustees and co-executors in their individual capacities, rather than a distribution from the trust itself or the decedent's estate. *Id.* at 707. The same is true of Vickie's counterclaim.

Similarly, in *Jansen v. Fitzpatrick*, 14 S.W.3d 426, 434 (Tex.App.2000), the court held that the district court had jurisdiction over claims more directly related to a probate proceeding than is Vickie's counterclaim. The decedent in *Jansen* had prepared a will naming certain individuals as residuary beneficiaries who, under the will, would receive shares in certain real property owned by the decedent. *Id.* at 429. Subsequent to the preparation of this will and two months before her death, the decedent gave the real

property to her niece. *Id.* After the decedent's death, the residuary beneficiaries sued the niece in district court, seeking to have the deathbed conveyance set aside on the grounds that the decedent was incompetent at the time she made the conveyance and under the undue influence of the niece. *Id.* at 430. The district court's jurisdiction was upheld by the court of appeals, although it was challenged on grounds other than those at issue here. *Id.* at 432-33.

Pierce attempts to distinguish *Sobel* and *Jansen* on the grounds that those suits were against executors and a specific provision of the Texas Probate Code provides for concurrent jurisdiction over actions against executors. *See* Tex. Prob.Code Ann. § 5(d) (Vernon 1980). However, neither the *Sobel* nor *Jansen* court relied on this provision in analyzing whether the claims at issue were "incident to an estate." Further, the statutory provision cited by Pierce also provides for concurrent jurisdiction over actions "involving an *inter vivos* trust," and under Pierce's characterization of Vickie's counterclaim, which differs from the Court's, her claim would fall within this provision.

Pierce also argues that Texas's "dominant jurisdiction" theory, under which the first court to assert jurisdiction over a matter exercises that jurisdiction to the exclusion of all other courts, means that once the Texas probate proceeding was pending, no Texas district court could have heard Vickie's counterclaim. However, this rule is subordinate to the test for whether an action is appertaining or incident to an estate. Thus, if an action is appertaining or incident to an estate and a probate proceeding is pending, under the doctrine of dominant jurisdiction no other court can exercise jurisdiction over matters appertaining or incident to the estate. However, other courts may exercise jurisdiction over matters that are not incident to the

estate. *See Falderbaum*, 964 S.W.2d at 747 (holding that a district court "was not required to abate" an action brought under concurrent probate and district court jurisdiction because the action was not incident to the estate). Here, under the authority of *Sobel*, Vickie's counterclaim is not incident to J. Howard, Sr.'s estate, and hence the dominant jurisdiction doctrine does not apply to it.

Finally, Pierce also notes that under Texas law, a probate court may in some settings have the power to draw in an action pending in a district court on a transfer. Tex. Prob.Code Ann. § 5B (Vernon 1980). However, this provision is irrelevant both because such a transfer can be done only for matters incident to an estate and because that power does not negate the fact that if, for whatever reason, the probate court does not transfer in the action, the district court may continue to exercise jurisdiction over it.

Because, under Texas law, Vickie's counterclaim for tortious interference does not fall within the exclusive jurisdiction of a probate court, it does not fall within the probate exception to federal jurisdiction. Therefore, both the bankruptcy court and this Court have valid subject matter jurisdiction over this counterclaim.[14]

[14] Similarly, but considering Florida rather than Texas law, another federal court held that the probate exception did not bar federal courts from exercising jurisdiction over a claim for tortious interference with the expectation of an inheritance or gift when the plaintiffs alleged that the defendants "systemically and fraudulently acted to influence one Arthur Welch to revoke a last will and testament in which he had named the [plaintiffs] as substantial beneficiaries and to execute

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B. Core Versus Non-Core Distinction

Bankruptcy courts may exercise plenary powers only over "core" bankruptcy matters. Over matters that are not core, bankruptcy courts may not enter final judgment, but may only issue proposed findings of fact and conclusions of law. These are reviewed *de novo* by the district court, which then enters final judgment. The bankruptcy court determined that Vickie's counterclaim is a core matter. Pierce disputes this determination.[15]

As in the preceding discussion of jurisdiction, the Court rejects Vickie's suggestion that merely by filing a proof of claim, Pierce subjected himself to the bankruptcy court for all purposes. This theory does not appear to be to the current state of the law. First, the nature of Pierce's claim against Vickie must be analyzed separately from Vickie's counterclaim against Pierce. Otherwise, the body of law that has developed for analyzing counterclaims would be superfluous. Second, whether or not a certain proceeding is core or non-core is a legal question dependant on the issues raised and the procedural posture of the proceeding; a proceeding cannot be transformed from being non-core to being core through consent or waiver. It would go against *Marathon* to hold that by filing a proof of claim, a creditor consents or waives any objections to core

instead a will for the benefit of [defendants]." *DeWitt v. Duce*, 599 F.2d 676, 677 (5th Cir.1979).

[15] If Pierce is correct, this Court will exercise *de novo* review over the other aspects of the bankruptcy court's decision, which are not addressed in this order. If the bankruptcy court and Vickie are correct, this Court will review the other aspects of the bankruptcy court's decision for abuse of discretion.

treatment.[16] Consent is relevant to the discussion only in that a party may consent to the bankruptcy court issuing final judgment in a non-core matter, thereby rendering any distinction between whether that proceeding is core or non-core meaningless. However, such consent must be express, not implied. Fed. R. Bankr. P. 7012(b). While he failed either to admit or deny that Vickie's counterclaims are core in his answer, Pierce has never expressly consented to the bankruptcy court entering final judgment.[17]

Initially, Pierce argues that 28 U.S.C. § 157(b), which identifies certain types of proceedings as core, is not "jurisdictional." The word "jurisdiction," which is used in different ways in different contexts, has three relevant meanings or applications in the bankruptcy context. First, a characteristic that would deprive all federal courts of subject matter jurisdiction, such as the probate exception, deprives bankruptcy courts of subject matter jurisdiction. Second, bankruptcy courts, as adjuncts to the district courts, may only exercise "jurisdiction" over the matters given to them by statute. *See* 28 U.S.C. § 1334. Jurisdiction

[16] Vickie argues that *Langenkamp v. Culp*, 498 U.S. 42, 44, 111 S.Ct. 330, 331, 112 L.Ed.2d 343 (1990) supports her position. In that case, decided after *Marathon*, the Supreme Court held that after a creditor files a proof of claim, a preferential transfer action asserted in response by the debtor becomes a part of the allowance or disallowance of that claim and there therefore is no right to a jury trial. However, the Court framed the issue in terms of the nature of the claims, not consent. *Id.*

[17] Pierce's attorney once stated at a hearing in the bankruptcy court that Pierce would be "happy" and "pleased" to litigate in the bankruptcy court. Pierce's Appendix at 190-95. The most logical interpretation of these statements, in the context in which they were made, is that he was referring only to litigation of Pierce's claim and the dischargeability determination, not to Vickie's counterclaim.

in this second sense of the word is quite broad, covering all core matters and all non-core, "related" matters, but some matters may involve the debtor or the bankruptcy proceeding so tangentially that they are not even "related to" the bankruptcy case. Third, in so far as the word "jurisdiction" is used to mean the bankruptcy court's power to enter a final judgment, the bankruptcy court does not have "jurisdiction" to enter final judgments in non-core matters. However, while a bankruptcy court may not enter final judgment in a non-core matter, it may certainly exercise "jurisdiction" over the matter in the sense of hearing and presiding over the matter up to the point when it presents proposed findings of fact and conclusions of law to the district court.

Thus, Pierce's argument that § 157(b) is not "jurisdictional" is true in a certain sense but is somewhat beside the point. Section 157 governs the determination of whether a matter is core or non-core. The bankruptcy court has jurisdiction over both core and non-core matters. Having determined that Vickie's counterclaim does not fall within the probate exception to federal subject matter jurisdiction, the Court has disposed of all "jurisdictional" objections to this case. This is so because, at the least, Vickie's counterclaim is "related to" Vickie's bankruptcy case. "Related to" jurisdiction is very broad, covering any matter that "conceivably" could have an impact on the estate or the administration of it. *In the Matter of Wood*, 825 F.2d 90, 93 (5th Cir.1987). Vickie's counterclaim could have an impact on the estate as it could greatly increase the size of the estate.

However, for the reasons that follow, while it is a "related" matter, Vickie's counterclaim is not a core bankruptcy proceeding.

Any discussion of the distinction between core and non-core matters must start with the Supreme Court's decision in *Marathon*. In this case, the Supreme Court considered the constitutionality of the Bankruptcy Act of 1978, the precursor to the modern bankruptcy code. A plurality of the Court held that it was unconstitutional to vest full and final authority over any matter conceivably related to a bankruptcy case in non-Article III judges, because under the Constitution, the "judicial power" of the United States, if vested in lower federal courts at all, must be vested in courts with Article III safeguards. *Marathon*, 458 U.S. at 84-87, 102 S.Ct. at 2878-80. Because of its Article I power to determine the substantive components of bankruptcy law, Congress may provide that bankruptcy judges can exercise full authority over those bankruptcy proceedings that are so closely related to substantive bankruptcy law and procedures that they can be said to be "core" bankruptcy matters. *Id.* However, Congress may not, through statutory enactments, give Article I bankruptcy judges the power to render final judgments over matters that are not directly connected to the bankruptcy code. *Id.*

The modern bankruptcy code's distinction between core and non-core "related" matters is a direct response to the constitutional concerns addressed in *Marathon*. Specifically, the code provides:

> Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11 . . . and may enter appropriate orders and judgments, subject to [appellate] review under section 158 of this title.

28 U.S.C. § 157(b)(1). Thus, Congress defined "core" matters as "cases under title 11" and "core proceedings arising under title 11[ ] or . . . in a case under title 11." *Id.* The legislative history indicates that through this definition, Congress intended for bankruptcy judges to exercise final authority over as many matters as constitutionally possible.

Proceedings "arising under" title 11 are those substantive claims for relief that are based on rights expressly granted by title 11, the bankruptcy code. *In the Matter of Wood*, 825 F.2d at 96. This provision functions analogously to 28 U.S.C. § 1331, which grants federal courts jurisdiction over claims "arising under" the Constitution or laws of the United States. *Id.; see also* 1 Lawrence P. King, *Collier on Bankruptcy* ¶ 3.01 [4][c][i] (15th ed.2000). Proceedings "arising in" a case under title 11 are procedural actions that could only happen in a bankruptcy case. The Fifth Circuit has explained:

> The meaning of "arising in" proceedings is less clear, but seems to be a reference to those "administrative" matters that arise *only* in bankruptcy cases. In other words, "arising in" proceedings are those that are not based on any right expressly created by title 11, but nevertheless, would have no existence outside of the bankruptcy.

In the Matter of Wood, 825 F.2d at 97; *see also Collier, supra* ¶ 3.01[4][c][iv] (referring to actions "arising in" as a "residual category").

Both "arising under" and "arising in" proceedings can be distinguished from proceedings that are only "related to" the bankruptcy case. "Related to" proceedings are

substantive claims for relief based upon non-bankruptcy law that could have been the subject of an independent lawsuit absent the filing of a bankruptcy case. *Collier, supra* ¶ 3.01[4][c][iv]. In general, the distinction is stated as follows: if a cause of action is not dependant on the bankruptcy code for its existence, but could have been asserted as an independent lawsuit absent the filing of a bankruptcy case, it is a non-core, related matter. *In the Matter of Wood*, 825 F.2d at 96-97. This distinction stems from the constitutional requirements set forth in *Marathon*.

Considering these general definitions of "core" and "arising under" and "arising in," Vickie's counterclaim appears to be non-core. Substantively, the counterclaim is based entirely on state law. If she had not filed for bankruptcy, she could have asserted the counterclaim in an independent lawsuit against Pierce. Her counterclaim is not based on a right granted by bankruptcy law.

The analysis cannot end here, however. Many of the claims that are litigated in a bankruptcy case could have been separate lawsuits if no bankruptcy petition had ever been filed. This alone does not render the claims non-core, because such a result would eviscerate most of bankruptcy law itself. As stated by Representative Kastenmeier in the legislative history:

> State law rights arising in core bankruptcy proceedings are functionally equivalent to congressionally created rights, because Congress has the power to modify State law rights in bankruptcy proceedings. Unlike the States, Congress may impair the obligations of contracts through the bankruptcy clause. Indeed, the very purpose of bankruptcy is to modify the rights of debtors and

> creditors, and the bankruptcy code authorizes the bankruptcy court to abrogate or modify State-created obligations in many ways.

130 Cong. Rec. H1110 (daily ed. Mar. 20, 1987) (quoted in *Collier, supra* ¶ 3.02[2]). Thus, in determining whether a claim is core or non-core, courts must consider both the substantive nature of the claim and the procedural posture whereby it is asserted. For example, the filing of a proof of claim creates a bankruptcy core proceeding even though the underlying state law claim would not have been. *In re Bellucci*, 119 B.R. 763 (Bankr.E.D.Cal.1990).

In making this analysis of both the substantive and procedural aspects of the proceedings at issue, courts look to 28 U.S.C. § 157(b)(2), in which Congress set forth a list of specific matters it viewed as core.[18] The only provision of § 157(b)(2) that is relevant to Vickie's counterclaim is § 157(b)(2)(C), which states that "counterclaims by the [debtor's] estate against persons filing claims against the [debtor's] estate" are core proceedings.[19] Counterclaims can be core under this definition when they "arise in" a bankruptcy case. The bankruptcy court held that because of this provision, Vickie's counterclaim is core.

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[18] Proceedings not specifically listed in the statute may still be considered core. The statute itself has a "catch-all" provision, and also it states that core proceedings "include" those specifically enumerated. 28 U.S.C. § 157(b)(2).

[19] Vickie also argues that her counterclaim is core as a turnover proceeding under 28 U.S.C. § 157(b)(2)(E). However, the counterclaim ruled on by the bankruptcy court addressed whether Pierce owes Vickie damages in an individual capacity and did not address, for example, turnover of community property already belonging to Vickie. Therefore, the counterclaim cannot be characterized as a turnover proceeding and cannot receive core treatment on that grounds. *In re Kincaid*, 917 F.2d 1162, 1165 (9th Cir.1990).

On first impression, the bankruptcy court's decision appears correct. First, the Court agrees with the bankruptcy court that Vickie's counterclaims are not rendered outside the scope of § 157(b)(2)(C) solely because they were brought against Pierce's adversary complaint, rather than against his actual proof of claim. The Pierce adversary proceeding began with an adversary complaint filed by Pierce seeking a determination of dischargeability and a proof of claim, which stated that the amount of his damages was "unliquidated" and to which was attached a copy of his nondischargeability adversary complaint. Vickie answered the complaint and filed counterclaims against it, and she objected to the proof of claim. Numerous courts have found claims asserted by the debtor against a person who has filed proofs of claims against the estate to be counterclaims within the meaning of this section, and therefore core proceedings, even though the claims were asserted by procedures other than counterclaiming against the proof of claim itself. *See, e.g., In re Carrington Gardens Assocs.*, 248 B.R. 752, 766-67 (Bankr.E.D.Va.2000) (holding that a creditor had "waived its right to limit or bar the bankruptcy court from hearing counterclaims to" its proof of claim against the debtor because, "[b]y filing its proof of claim," it "in essence converted [the debtor's] adversary proceeding . . . [to] a counter claim").[20]

[20] For similar cases, see *In re Performance Nutrition, Inc.*, 239 B.R. 93, 99 (Bankr.N.D.Tex.1999) (holding that claims in a bankruptcy trustee's adversary complaint against two persons who had filed proofs of claims against the estate were counterclaims); *Allen v. City Finance Co.*, 224 B.R. 347, 352 (S.D.Miss.1998) (holding that claims asserted in a complaint filed by the debtor against a creditor who had filed proofs of claim "were, in essence," counterclaims against the creditor); *see also Pan American World Airways, Inc. v. Evergreen Intern. Airlines, Inc.*, 132 B.R. 4, 7 (S.D.N.Y.1991) (holding that claims in a complaint

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Second, the Court rejects Pierce's argument that he sought only a determination of dischargeability and did not actually make a claim against Vickie's estate. It is true that a nondischargeability complaint does not automatically include or subsume the underlying claim but is instead a separate, theoretically distinct claim. *In re Thrall*, 196 B.R. 959, 967-68 (Bankr.D.Colo.1996). However, here Pierce filed a proof of claim in addition to his nondischargeability complaint. On that proof of claim, he stated that he had a claim for an "unliquidated" amount. He nonsuited Vickie from his then-pending state court defamation action, and he never sought relief from the automatic stay. As his counsel explained at a hearing in the bankruptcy court on a motion brought by Pierce to dismiss or stay Vickie's counterclaims, Pierce "took" his substantive defamation claim and "put" it into the form of the nondischargeability adversary complaint:

> A lawsuit for libel or slander was filed prepetition in Dallas County. The Debtor filed bankruptcy in January. And that matter was stayed. The trial counsel nonsuited the Debtor. We took the claims against the Debtor that were set forth in the . . . slander action, put them into a nondischargeability complaint – . . . . So the allegations that formed the state court petition for libel and slander, as they related to the Debtor, were then taken and put into the nondischargeability complaint, which we filed here in this Court. Now, it was filed as a nondischargeability complaint because we believe that there's evidence to demonstrate [that

initiated by the debtor against an entity that had not yet filed a proof of claim in the bankruptcy proceeding, but intended to do so, were counterclaims within the meaning of § 157(b)(2)(C)).

> Vickie acted willfully and maliciously]. So, under 523, it was like a dischargeability complaint and it was filed here.

Vickie's Appendix, Tab 7, at 4:8-14; 6:14-7:1. Later in the same hearing, Pierce's counsel stated that he "has assumed . . . that if the Court was going to stay the counterclaims, you would have stayed the entire adversary proceeding, *which included the slander lawsuit* that was filed under 523. . . . [W]e'd be happy to stay *both halves* of the action. . . ." *Id.* at 20:17-25 (emphasis added). Thus, given that he filed a proof of claim in addition to his nondischargeability adversary complaint, and given that he never tried to continue to pursue the substantive aspect of his defamation claim against Vickie elsewhere, Pierce cannot now argue that he never made a claim against her estate.

Thus, Vickie's counterclaim for tortious interference falls within the literal language of § 157(b)(2)(C). However, most courts agree that the plain language of § 157(b)(2)(C) cannot be the end of the analysis, because such a construction would conflict with *Marathon*. In the statute, Congress set forth its view as to what matters fall within the constitutional parameters, but in interpreting the statute, courts must consider not just the literal language of the statute, but the constitutional concerns behind it. *In re Castlerock Properties*, 781 F.2d 159, 162 (9th Cir.1986). Specifically as to § 157(b)(2)(c), footnote 31 of the plurality opinion in *Marathon* suggests that it would be unconstitutional to hold that any and all counterclaims are core and therefore can be finally determined by a bankruptcy judge. *Marathon*, 458 U.S. at 79 n. 31, 102 S.Ct. at 2876 n. 31.

Thus, on the one hand, calling any counterclaim that falls within the literal language of the statute core seems

to contradict the holding of *Marathon*. On the other hand, calling any counterclaim that could have been asserted as an independent lawsuit non-core seems to render § 157(b)(2)(c) itself nugatory, because any counterclaim could have been asserted as a separate lawsuit absent the filing of the bankruptcy petition. *Collier* notes this problem and states that "[t]he matter is still unsettled." *Collier, supra* ¶ 3.02[3][d][i].

It appears that the justification for core treatment for counterclaims is a combination of judicial economy and efficiency for the litigants, in addition to recognition of the fact that practically, adjudication of a counterclaim that is closely related to a claim will almost merge into allowance or disallowance of the claim itself. *In re Castlerock*, 781 F.2d at 162.[21] Keeping these concerns in mind, courts have developed various doctrines for limiting the reach of § 157(b)(2)(C). For example, courts are loath to call counterclaims core when they are filed against a proof of claim that was filed "defensively" by a creditor who has already tried to have its claim determined by a court other than the bankruptcy court. *In re Castlerock*, 781 F.2d at 162. This exception does not apply in this case, because Pierce filed his proof of claim offensively.

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[21] The Ninth Circuit issued its opinion in *In re Castlerock* soon after the modern bankruptcy code was enacted. In this passage, it also states that "well-settled law" holds "that a creditor consents to jurisdiction over related counterclaims by filing a proof of claim." *In re Castlerock*, 781 F.2d at 162. However, the law it cites in support of this proposition is all pre-*Marathon*, and the court did not specifically consider the impact of *Marathon* on the prior practice of jurisdiction by consent. As indicated, this does not appear to be the law post-*Marathon*. However, the policy reason for the rule could still be the animating force behind § 157(b)(2)(C).

In addition, counterclaims that are permissive, rather than compulsory, do not receive core treatment. A compulsory counterclaim is one that arises out of the same factual transaction as the claim against which it is asserted. Fed.R.Civ.P. 13(a). The bankruptcy court held that Vickie's counterclaim arises out of the same transaction as Pierce's defamation claim. Pierce alleged that Vickie had acted willfully and maliciously by defaming him when her attorneys, at her direction, told members of the press that Pierce used forgery, fraud, and overreaching to gain control of J. Howard, Sr.'s estate. Libel and defamation claims are nondischargeable under § 523(a)(6) when the statements were made with actual knowledge of their falsity. *Wheeler v. Laudani*, 783 F.2d 610, 615 (6th Cir.1986). Thus, at issue, in addition to whether Vickie was responsible for the statements of her attorneys, is whether she knew the statements to be true or false. The bankruptcy court held that proving the truth or falsity of the statements requires proof of some of the same facts as are at issue on Vickie's counterclaim. *Cf. Albright v. Gates*, 362 F.2d 928, 929 (9th Cir.1966) (holding that a counterclaim for recovery of the price paid for oil rights was a compulsory counterclaim to a claim for slander consisting of stating the oil rights were worthless).

However, this nexus between the transactions out of which the claim and counterclaim arise at issue is somewhat attenuated.[22] Pierce had already obtained a judgment

[22] Pierce also argues that even if it arises from the same transaction, Vickie's counterclaim is not compulsory because otherwise-compulsory counterclaims need not be stated if they are the subject of another pending action, and Vickie's counterclaim originally was at issue in the Texas probate proceeding. However, while the party asserting a counterclaim may decline to do so if the counterclaim is the

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against Vickie's attorneys prior to the time when his claim against Vickie was ruled on by the bankruptcy court. The main issue presented by Pierce's claim is Vickie's responsibility for the statements of her attorneys, not the statements' truth or falsity. Thus, the primary facts at issue on Pierce's claim were the relationship between Vickie and her attorneys and her knowledge or approval of their statements. *See generally In re Durso Supermarkets, Inc.*, 170 B.R. 211, 214 (S.D.N.Y.1994) (holding that when a proof of claim is filed based on a state court judgment, the judgment itself is a different factual transaction from the fact underlying it and thus a counterclaim arising out of the same facts as the underlying action was not core, thereby suggesting that the factual transaction test need not be applied reflexively in all circumstances).

Thus, it is not certain that Vickie's counterclaim arises from the same transaction as Pierce's proof of claim. Further, considering both the general rule behind the core classification, which stems from the constitutional concerns of *Marathon*, and also the specific policy that underlies § 157(b)(2)(C), the Court concludes that the counterclaim is not core.

As indicated, absent Pierce's filing of a proof of claim regarding the alleged defamation, the counterclaim clearly would be only a non-core, related matter. In this case, the reasons for why counterclaims arising out of the same

subject of another proceeding, the party is not required to do so. 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1411, at 87 (3d ed. 1998) ("If defendant elects to interpose the pending claim as a counterclaim, however, he should be allowed to do so, and the counterclaim will be treated as if it were compulsory.").

transaction should usually be considered core do not apply. Counterclaims can be core in essence because of judicial economy and what, as a practical matter, makes good sense for the litigants. The purpose of the rule is to prevent a debtor or trustee from having to split a cause of action by defending against a proof of claim in the bankruptcy proceeding but being unable to assert counterclaims there, instead being forced to pursue counterclaims in a different proceeding or forum. *In re Castlerock*, 781 F.2d at 162. Treating Vickie's counterclaim as core is not necessary to advance these policies in this case.

Here, Vickie's counterclaim dwarfs Pierce's defamation in all respects, both in terms of the time and effort spent litigating it and the size of the potential judgment. On Vickie's motion, the bankruptcy court granted summary judgment to Vickie on Pierce's adversary complaint, holding that Vickie was not responsible for any statements made by her attorneys. The counterclaim proceeded to trial and has been pending for over two years since then on its own. The bankruptcy court confirmed Vickie's plan of reorganization on March 8, 1999, over six months before the counterclaim went to trial. While arguably the defamation and tortious interference claims arise out of the same factual transaction, this connection is attenuated. Further, the counterclaim raises issues of law entirely different from those raise[d] on the defamation claim.[23]

[23] Considering in particular that the policy underlying the counterclaim rule is that the debtor should not have to split a cause of action into two forums, the Court notes that Vickie in fact voluntarily pursued similar or substantially similar claims in the Texas probate proceeding until after the bankruptcy court entered its final judgment.

In *In re Kamine/Besicorp Allegany, L.P.*, 214 B.R. 953, 968-71 (Bankr.D.N.J.1997), the court held that counterclaims asserted by the debtor against a creditor that had filed a proof of claim were not core, notwithstanding the fact that they arose from the same transaction as the proof of claim. The debtor owned and operated a power plant. *Id.* at 955. Pre-petition, a dispute arose between it and another entity involved in power production. After the debtor filed for bankruptcy, the other entity filed proofs of claim and then the debtor counterclaimed, asserting in part state common law contract claims. Discussing many of the same arguments advanced by Pierce and Vickie in this case, the court held that the counterclaim did not fall within § 157(b)(2)(C) and was not core because the filing of the proof of claim did not "initiate" or "create" the causes of action asserted in the counterclaim. *Id.* at 969. While procedural distinctions render *In re Kamine/Besicorp* not exactly analogous to the present case, this aspect of it is the same: Vickie's counterclaim was not "created" by Pierce's claim. Her dispute with Pierce runs much deeper and broader than his defamation claim and would exist even in the absence of his defamation claim.

In addition, while it does not give it much weight as the issue was not being directly argued, the Court notes that at a hearing in bankruptcy court on July 24, 1996, counsel for Vickie in fact stated that "we believe the counterclaims are related." Pierce's Appendix at 193:22.

Good arguments exist on both sides of this issue, and the Court acknowledges that reasonable jurists might differ in how they would decide it. Formally, Vickie's counterclaim falls within the language of § 157(b)(2)(C) and, barely, it falls within the "same transaction" rule courts have used when applying § 157(b)(2)(C). However,

neither of those rules are ends in and of themselves. They serve only as means of amplifying and explicating the distinction drawn in *Marathon*. As the Ninth Circuit stated in *In re Castlerock*, "a court should avoid characterizing a proceeding as 'core' if to do so would raise constitutional problems. The apparent broad reading that can be given to § 157(b)(2) should be tempered by the *Marathon* decision." *In re Castlerock*, 781 F.2d at 162; *see also In re Thrall*, 196 B.R. at 968 ("A claim is not core simply because it falls within the wording of § 157(b)(2); the claim must also satisfy the mandate of [*Marathon*]."). When a counterclaim is only somewhat related to the claim against which it is asserted, and when the unique characteristics and context of the counterclaim place it outside of the normal type of set-off or other counterclaims that customarily arise, thus rendering the efficiency concerns not at issue, the counterclaim should not be characterized as core.

IV.
CONCLUSION

The bankruptcy court's assertion of federal subject matter jurisdiction over Vickie's counterclaim for tortious interference is AFFIRMED. However, the bankruptcy court's determination that the counterclaim is a core proceeding is REVERSED. Because the counterclaim is a non-core proceeding, the bankruptcy court's judgment is VACATED.

The Court's decision means only that final judgment in this non-core proceeding must be entered by this Court rather than the bankruptcy court. By this order, the Court rules that the bankruptcy court's judgment is proposed

rather than final, and therefore neither party has prevailed at the present time. Thus, Vickie's claim against Pierce for tortious interference has not yet been resolved by any court.[24] This Court will now engage in a comprehensive, complete, and independent review of the bankruptcy court's record and may, if warranted, hear additional testimony from the parties and witnesses. This review will enable this Court to decide whether J. Howard, Sr. promised a gift to Vickie, whether Pierce interfered with that gift, and also whether Pierce has destroyed and failed to produce relevant evidence in a way that justifies the imposition of sanctions.

As a consequence of this ruling, the current arrangements regarding security for a stay on execution of the judgment pending appeal are VACATED.

The Court sets a status conference in this matter for June 4, 2001 at 8:30 a.m. in Santa Ana. Prior to this conference, attorneys for the parties should meet and confer, in person, regarding the effect of this ruling on all matters pending between these and related parties. They shall file a joint status report regarding such issues no later than May 31, 2001 at 4:00 p.m.

Because this order involves two "controlling question[s] of law as to which there is substantial ground for difference of opinion and . . . an immediate appeal from the order may materially advance the ultimate termination of the litigation," 28 U.S.C. § 1292(b), the Court hereby CERTIFIES this order for interlocutory appeal as to both the issue of the probate exception and the issue of

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[24] Vickie's claim against Pierce individually was not addressed or determined by the Texas probate court.

whether Vickie's counterclaim is a core or non-core proceeding. Any appeal from this order shall not stay proceedings before this Court unless the Court of Appeals so orders.[25]

IT IS SO ORDERED.

[25] The Court originally issued this order on May 24, 2001, without including any statement as to certification under 28 U.S.C. § 1292(b). Because a § 1292(b) certification must be in the order certified for appeal itself, the Court now issues this order in amended form including the requisite statement. *See* 28 U.S.C. § 1292(b) and Fed. R.App. P. 5(a)(3).

257 B.R. 35

United States Bankruptcy Court,
C.D. California.
In re Vicki Lynn MARSHALL, Debtor.
E. Pierce Marshall, Plaintiff,
v.
Vicki Lynn Marshall, Defendant.
Vicki Lynn Marshall, Counterclaimant,
v.
E. Pierce Marshall, Counterdefendant.
Bankruptcy No. LA 96-12510-SB.
Adversary No. 96-01838-SB.

Dec. 29, 2000.

John P. Melko, Verner, Liipfert, Bernhard, McPherson and Hand, Chartered, Houston, TX.

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ORDER ON MOTION FOR ENTRY OF JUDGMENT

SAMUEL L. BUFFORD, Bankruptcy Judge.

Trial in this adversary proceeding took place in October and November, 1999. It has come time to resolve the remaining issues in this adversary proceeding, and to issue a judgment. This opinion addresses three issues: (1) whether the alleged probate exception to federal jurisdiction applies to this adversary proceeding; (2) whether this

is a "core proceeding" within the meaning of 28 U.S.C. § 157(b); and (3) what form the judgment in this adversary proceeding should take.

A. Jurisdiction

E. Pierce Marshall continues to complain that this court lacks jurisdiction over this adversary proceeding because this claim belongs in the probate case now in trial in Texas. Notably, however, he has never brought a motion on this subject on proper notice pursuant to this court's motion rules. For this reason alone this issue has never been properly brought before this court, and E. Pierce Marshall is entitled to no relief on this subject.

In addition, by filing his claim in this bankruptcy case and by filing this adversary proceeding against Vicki Marshall, E. Pierce Marshall voluntarily submitted to the jurisdiction of this bankruptcy court.

He cannot now complain of the consequences thereof, especially after the court has ruled on the merits of his dispute with Vicki Marshall.

1. Supreme Court Case Law

The extent of the equity jurisdiction of the bankruptcy court in this case is governed by United States Supreme Court precedent. The Supreme Court has stated, "by filing a claim against a bankruptcy estate the creditor triggers the process of allowance and disallowance of claims, thereby subjecting himself to the bankruptcy court's equitable power." *Langenkamp v. Culp,* 498 U.S. 42, 44, 111 S.Ct. 330, 331, 112 L.Ed.2d 343 (1990) (internal quotes omitted).

This equity jurisdiction of the bankruptcy court includes both claims *by* the creditor against the estate and claims *against* the creditor by the estate's representative. In *Langenkamp,* for example, the Supreme Court found that a preference action filed against a creditor who had filed a claim was "a part of the claims-allowance process," and that the filing of the claim waived the right to a jury trial in the preferential transfer adversary proceeding. *Id.* "In other words," the Supreme Court said, "the creditor's claim and the ensuing preference action by the trustee become integral to the restructuring of the debtor-creditor relationship through the bankruptcy court's equity jurisdiction." *Id.*

By contrast, in an earlier case the Supreme Court found that a fraudulent transfer adversary proceeding did not come within the "process of allowance and disallowance of claims." *Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33, 57-59, 109 S.Ct. 2782, 2799, 106 L.Ed.2d 26 (1989) (holding that defendants had a right to a jury trial). The Supreme Court reached this result, however, only because the defendants had *not* filed claims in the bankruptcy case. *See Langenkamp,* 498 U.S. at 44-45, 111 S.Ct. at 331. Indeed, the purpose of *Langenkamp* was to eliminate any speculation that the right to a jury trial might survive the filing of a claim in the bankruptcy case, and to make clear that the equity jurisdiction of the bankruptcy court extended to all claims between a creditor and the estate, once the creditor files a claim.

Similarly, in *Hong Kong & Shanghai Banking Corp. v. Simon (In re Simon),* 153 F.3d 991 (9th Cir.1998), the Ninth Circuit found that, by filing a claim, the bank "forfeited any right it had to claim that the court lacked the power to

enjoin [it] from commencing a post-bankruptcy collection proceeding against the debtor" in Hong Kong. *Id.* at 997.

The teaching of *Langenkamp, Granfinanciera* and *Simon* is that the filing of a claim in a bankruptcy case has substantial procedural consequences for the claimant. By filing a claim, a claimant voluntarily submits to the equity jurisdiction of the bankruptcy court for the allowance and disallowance of all claims made *by* the claimant against the bankruptcy estate or made *against* the claimant by the bankruptcy estate's representative.

E. Pierce Marshall filed his claim against the bankruptcy estate in this case. He thus voluntarily submitted himself to the bankruptcy court's equity jurisdiction as to all claims by the estate against him, including the claims asserted in this adversary proceeding.

2. The "Probate Exception" to Federal Jurisdiction

E. Pierce Marshall also argues that this court has no jurisdiction over debtor's counterclaim because it essentially involves a probate matter pending in a Texas court that is subject to a probate exception to federal jurisdiction.

While there is a probate exception to federal jurisdiction, it is applicable principally to diversity jurisdiction under 28 U.S.C. § 1332 (2000). *See, e.g., Georges v. Glick,* 856 F.2d 971 (7th Cir.1988) (holding that probate exception applies only in diversity cases); *Goerg v. Parungao (In re Goerg),* 844 F.2d 1562 (11th Cir.1988) (same).[1] As the

[1] Notably, E. Pierce Marshall fails to cite either of these cases.

court in *Goerg* specifically stated, "[t]hat exception relates only to 28 U.S.C. § 1332 (1982), and has no bearing on federal question jurisdiction, the jurisdiction invoked in bankruptcy cases." *Id.* at 1565 (footnote omitted). The court in *Goerg* further warned: "[c]are should be taken not to confuse the question of the breadth of Congress' bankruptcy power with the so-called "probate exception" to statutory diversity jurisdiction." *Id.* Furthermore, the probate exception to diversity jurisdiction must be narrowly construed. *Georges,* 856 F.2d at 973. The court in *Goerg* declared generally: "[o]wing to the supremacy clause, federal bankruptcy law preempts state law; as one of Congress' enumerated powers, the power to enact bankruptcy laws is limited only by the substantive guarantees contained in the Constitution." *Goerg,* 844 F.2d at 1565.

Virtually all of the cases that E. Pierce Marshall cites in support of his argument are diversity cases, and thus are inapplicable in this case. As in the *Goerg* case, this court's jurisdiction over this adversary proceeding rests on the federal question jurisdiction applicable in bankruptcy cases.

Goerg and *Georges* may overstate the lack of a probate exception to federal jurisdiction. In *Markham v. Allen,* 326 U.S. 490, 66 S.Ct. 296, 90 L.Ed. 256 (1946)[2], the Supreme

[2] E. Pierce Marshall also relies on two quite old United States Supreme Court decisions, which the court finds inapposite. In *Sutton v. English,* 246 U.S. 199, 38 S.Ct. 254, 62 L.Ed. 664 (1918), a suit to annul a will, the Supreme Court found no federal question and no diversity of citizenship, and thus no colorable basis for federal jurisdiction. *Id.* at 200, 208, 38 S.Ct. 254. In *O'Callaghan v. O'Brien,* 199 U.S. 89, 25 S.Ct. 727, 50 L.Ed. 101 (1905), the Supreme Court found that the only

(Continued on following page)

Court held that a federal court may properly exercise jurisdiction over a case brought against the executor and resident heirs of a decedent's estate that was in the course of probate administration in state court. Federal jurisdiction arose under the Trading With the Enemy Act, where the plaintiff was a federal officer authorized to receive inheritances in place of German heirs during World War II.

The Supreme Court in *Markham* found that the probate limitation on federal jurisdiction only prohibits a federal court from probating a will, administering a decedent's estate, or assuming control of property in the custody of the state court. *See id.* at 494, 66 S.Ct. 296. The Supreme Court found that a federal court may properly adjudicate rights in probate property, so long as its final judgment does not undertake to interfere with the state court's possession of the property. *Id.* The Supreme Court held that the lower court's ruling that the plaintiff was entitled to all of the net probate estate after payment of debts, taxes and expenses of administration was a proper exercise of federal jurisdiction. *Id.* at 495, 66 S.Ct. 296.

The *Markham* rationale would permit this court to determine (if appropriate on the merits) that Vicki Marshall is entitled to all (or a portion) of the net assets in the possession of the Texas probate court (except as to any parties over whom this court has not had jurisdiction). However, this court's rulings do not affect the disposition of the Texas probate assets.

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asserted ground for federal jurisdiction was frivolous. *Id.* at 100-01, 25 S.Ct. 727.

E. Pierce Marshall relies particularly on *Beren v. Ropfogel,* 24 F.3d 1226 (10th Cir.1994), which involved a claim for an expectation of inter vivos gifts or testamentary dispositions. This case, which also appears to be a diversity case, provides no assistance to E. Pierce Marshall. The court sustained the dismissal of claim for an expectation of a gift or testamentary devise on the grounds of failure to state a claim for relief, not on jurisdictional grounds. *See id.* at 1229-30.

Furthermore, the "probate exception" issue has never been properly brought before this court. This issue was first raised by Pierce Marshall in a motion *in limine* that was filed on October 18, 1999, and set for hearing on the first day of trial on October 28, 1999. This procedure violated the court's motion rule, Local Rule 9013-1, which requires 21 days notice of a motion (24 days if served by mail). The court finds that this issue was raised at that time principally for the purpose of delaying the trial.

Pierce Marshall waived his right to make this argument by waiting until several rounds of sanctions had been imposed on him before raising it. Ninth Circuit law holds that a party cannot wait until trial, after the case is going badly for that party, to raise a jurisdictional issue. *See Hill v. Blind Industries & Services,* 179 F.3d 754 (9th Cir.1999).

The court finds that the "probate exception" argument was waived because it was not raised in a timely fashion. A renewal of this argument now, a year after trial, at the time for entry of judgment, is likewise not timely.

3. Abstention

On January 6, 1997 E. Pierce Marshall filed his motion contending that mandatory or discretionary abstention applied to Vicki Marshall's counterclaim. As to mandatory abstention, E. Pierce Marshall argued that this portion of the dispute should be heard in a court in Louisiana rather than this court, because J. Howard Marshall II's probate case was pending there. In fact, shortly thereafter the Louisiana Supreme Court dismissed the probate action for lack of jurisdiction. Probate proceedings were subsequently filed in Harris County Court in Houston Texas, and remain pending.

E. Pierce Marshall's motion for abstention was untimely. It was not even filed until eight months after this adversary proceeding was filed, at which time this adversary proceeding was well under way.

This court's denial of mandatory abstention has been vindicated both by the lack of Louisiana jurisdiction all together, and by the fact that the trial in the Texas probate action did not begin until nearly four years after this court denied E. Pierce Marshall's motion for abstention, and nearly a year after this court's own trial in this adversary proceeding, and still remains pending.

This court ruled on the abstention motion in 1997, and this ruling is now only subject to review on appeal.

B. Counterclaim as a Core Proceeding

On July 8, 1996 E. Pierce Marshall moved for dismissal of the counterclaim on the grounds of lack of jurisdiction. In opposition to the motion to dismiss, Vicki Marshall asserted that the counterclaim fell within this

court's core jurisdiction under 28 U.S.C. § 157(b)(2)(C), on the grounds that the counterclaim in the adversary proceeding was in substance a counterclaim against E. Pierce Marshall's claim against the estate.

At the hearing on August 14, 1996 the court found that the counterclaim in the adversary proceeding was in substance also a counterclaim to Pierce Marshall's claim filed in this case, pursuant to which he voluntarily submitted to the jurisdiction of this court. The court found that the only substantial difference between E. Pierce Marshall's claim that he filed in the bankruptcy case and the complaint that he filed in the adversary proceeding was that in the adversary proceeding he sought a determination that the debt asserted in the claim was nondischargeable. The court further found that the counterclaim arose out of the same transactions and occurrences as the claim and the adversary complaint. Because of the close relation between E. Pierce Marshall's claim and his adversary complaint, the court consolidated the proceedings for all purposes, including trial and judgment.

E. Pierce Marshall raised a question at oral argument whether *Piombo Corp. v. Castlerock Properties (In re Castlerock Properties)*, 781 F.2d 159 (9th Cir.1986), would require a finding that the counterclaim is not a core proceeding. *Castlerock* is clearly a different case from this. In *Castlerock* the Ninth Circuit found that adversary proceeding at issue was not a core proceeding, because it was filed before the creditor filed its claim in the bankruptcy case. *Id.* at 161-62. Here, to the contrary, the counterclaim was filed in the adversary proceeding voluntarily filed by E. Pierce Marshall in this court, after he had also voluntarily filed his claim in this case. His voluntary

submission to the jurisdiction of this court could not be more clear.

Furthermore, the court's August 14, 1996 determination that the counterclaim and the adversary proceeding was also essentially a counterclaim to Pierce Marshall's claim is not now open to further consideration in this court, unless an appellate court should require such further consideration.

Because this is a core proceeding, the court has power to enter judgment. As to related proceedings only, the court prepares findings of fact and conclusions of law and recommend a judgment, which is submitted to the district court for *de novo* review. *See* 28 U.S.C. § 157(c)(1). However, for a core proceeding the bankruptcy court enters its own judgment.

C. Entry of Judgment

Vicki Marshall has moved this court for entry of judgment on her counterclaim now, rather than delay until the completion of the probate trial in Texas. E. Pierce Marshall opposes the entry of judgment at the present time. The court finds the arguments of Vicki Marshall well taken, and the arguments of E. Pierce Marshall unpersuasive.

In the Court's order of October 6, 2000 the court determined that entry of judgment should await the resolution of the probate action in Texas, on the grounds that a calculation of Vicki Marshall's damages cannot be made until the probate court determines what inheritance Vicki Marshall is entitled to receive from her deceased husband J. Howard Marshall II. The court determined

that Vicki Marshall's damages (excluding punitive damages, subsequently awarded in the amount of $25 million) amounted to $449,754,134, less whatever she recovers in the probate action. Upon further consideration, and evaluation of the arguments of the parties, the court is persuaded that judgment can be awarded at the present time in a form to take account of any recovery by Vicki Marshall in the Texas probate action. Such a recovery is accommodated as follows: any amount that Vicki Marshall recovers in the probate action will count as partial (or full) satisfaction of the judgment issued herein.

The court finds a further reason for issuing judgment in this adversary proceeding sooner rather than later. E. Pierce Marshall appears to be planning to take an appeal in this dispute, and has made a motion for leave to file an interlocutory appeal. The sooner this court issues its judgment, the sooner a definitive appellate process can begin.

D. Injunctive Relief

In addition to a money judgment, the debtor requests injunctive relief as a part of this court's judgment. A claim for such relief is contained in the counterclaim. No preliminary injunctive relief was sought in this adversary proceeding. Thus the issue is limited to the issuance of a permanent injunction as part of this court's judgment.

Injunctive relief is not normally available as part of a money judgment. Rule 69 of the Federal Rules of Civil Procedure, incorporated by reference in Rule 7069 of the Federal Rules of Bankruptcy Procedure, incorporates by reference the state law for enforcement of judgments. Vicki Marshall has not shown that injunctive relief is also available as part of a judgment.

The United States Supreme Court touched on this issue in *Grupo Mexicano v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 119 S.Ct. 1961, 144 L.Ed.2d 319 (1999), where it found that a federal court may not issue a preliminary injunction to restrain lawful conduct to protect an anticipated judgment of the court. The Supreme Court observed that the equitable action known as a "creditors bill" is traditionally available to permit a judgment creditor to discover the debtor's assets, to reach equitable interest not subject to execution at law, and to set aside fraudulent conveyances. *See id.* at 319, 119 S.Ct. 1961. The Court noted that, as a general rule, a creditors bill could be brought only by a creditor who had already obtained a judgment establishing the debt. *Id.* The Court further noted that the law of fraudulent conveyances in bankruptcy was developed to prevent the hiding of assets by a defendant while litigation was in process. The Court also noted that state statutes eliminating the need for a judgment before bringing a fraudulent conveyance claim may have altered the common law rule and may permit the tying up of a defendant's assets while litigation is pending. *See id.*, at 324 n. 7, 119 S.Ct. 1961.

This court finds that the debtor has not shown her entitlement to injunctive relief in support of her money judgment. Accordingly, injunctive relief is denied at this point. However, the denial of injunctive relief is without prejudice to bringing in appropriate judgment enforcement procedures.

By separate document the court is issuing a judgment consistent with its rulings herein and in its prior orders.

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253 B.R. 550

United States Bankruptcy Court, C.D. California.
In re Vickie Lynn MARSHALL, Debtor.
E. Pierce Marshall, Plaintiff,
v.
Vickie Lynn Marshall, Defendant.
Vickie Lynn Marshall, Counterclaimant,
v.
E. Pierce Marshall, Counterdefendant.
Nos. LA 96-12510-SB, LA 96-01838-SB.

Oct. 6, 2000.

AMENDED MEMORANDUM OF DECISION FOLLOWING TRIAL

SAMUEL L. BUFFORD, Bankruptcy Judge.

I. Introduction

Debtor Vicki Lynn Marshall, also known as Anna Nicole Smith, is the surviving widow of J. Howard Marshall II, who was said to be the richest man in Texas.[1] Nonetheless, E. Pierce Marshall, J. Howard's[2] second son from a prior marriage, contends in the probate case now in trial in Probate Court in Houston, Texas that J. Howard died essentially penniless. In this adversary proceeding the court finds that Pierce tortiously interfered with

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[1] Testimony in a prior trial in an adversary proceeding in this bankruptcy case indicates that there may have been one Texan more wealthy than J. Howard at the time of his death.

[2] Because all of the principals in this case have the same last name, the court will refer to them by their first or second names, according to how they are commonly known.

Vickie's expectancy of an *inter vivos* gift that J. Howard instructed his attorneys to arrange.

The court finds that Vickie has suffered damages in the amount of $449,754,134, less whatever she receives from the probate of J. Howard's estate. These damages are mainly based on sanctions imposed on Pierce for his egregious discovery abuse in this adversary proceeding. A final calculation of the damages remains to be determined upon the completion of the probate case.

II. Findings of Fact

This adversary proceeding came on for trial on October 27, 1999 and proceeded for five days over a period of a week and a half. The court has heard the testimony of the witnesses who testified at trial, considered the testimony of those that appeared through deposition transcript, and evaluated the credibility of all of the witnesses. Insofar as the testimony of any witness conflicts with the findings herein (including findings imposed as discovery sanctions), the court finds that such testimony is not credible.

Vickie filed this bankruptcy case on January 25, 1996, a few months after the decease of her husband J. Howard. His estate remains tied up in a probate proceeding in Texas, where a trial is now in process. It appears that Vickie filed this bankruptcy case for two reasons: she had just suffered an $884,607.98 default judgment to her housekeeper Maria Cerrato on sexual misconduct claims,[3] and she had not received any inheritance from J. Howard.

[3] The sexual harassment case was subsequently settled.

Under her professional name of Anna Nicole Smith, Vickie has pursued an acting and modeling career. She appeared on the cover photo of Playboy Magazine in March, 1992, as the centerfold Playmate of the month in the May, 1992 issue, and as the Playmate of the Year for 1992. She is also known for her television appearances as a model for Guess Jeans. J. Howard promoted and encouraged this career before and during their marriage and paid for acting lessons for her.

After a courtship that lasted some two and a half years, Vickie agreed to marry J. Howard in June, 1994, and they were married immediately. At that time J. Howard was 89 years old, and Vickie was 26. This was the third marriage for J. Howard, and the second for Vickie. J. Howard had two sons from his first marriage, J. Howard Marshall III and Pierce. Vickie had a son from her prior marriage. While a prenuptial agreement was drafted, it was never signed by the parties.

J. Howard's wealth consisted principally in his ownership of approximately 16% of the outstanding shares of stock in Koch Industries, Inc. [hereinafter KII], the second largest privately held corporation in the United States. The Marshall interest in the KII stock was held by Marshall Petroleum, Inc. [hereinafter MPI]. J. Howard's interest in MPI was 70.51776%. The 16% interest in KII is particularly valuable because it was the controlling interest in deciding a family dispute in the early 1980's between two factions of the Koch family.[4] Most of the

[4] After the dust settled in 1981, Charles Kock and David Kock each held 40-41% of the KII stock, J. Howard held 16%, and the remainder was held by employees pursuant to an employee stock option plan.

income of KII has been reinvested in the business: typically less than ten percent has been distributed to shareholders.

As an inducement to marry him, J. Howard promised Vickie that he would leave her half of what he had. J. Howard made this promise repeatedly, both before and after the marriage.

In December, 1992 J. Howard instructed Harvey Sorensen, an attorney who represented him from time to time, to arrange a gift to Vickie, "his future wife," of a half interest in his "new community." This gift was to be structured so that the value of the gift was to be measured by J. Howard's interest in the increase in value of the underlying KII stock held by MPI. A few days earlier J. Howard also instructed Jeff Townsend, another attorney who did work for J. Howard, to arrange for Edwin Hunter, a third attorney, to prepare a "catch-all trust" for Vickie's benefit. Neither of these projects was completed **because Pierce fired Sorensen and conspired with Hunter to prevent the drafting and execution of the documents that would have accomplished the gift that J. Howard had directed.**[5]

At the time of trial,[6] J. Howard's interest in the KII stock was worth $1,640,978,961.[7] From the time that J.

[5] The text in bold print consists in findings that the court makes as sanctions for the discovery violations that are discussed *infra*.

[6] The actual valuation date for the KII stock for the purposes of trial was August 31, 1999.

[7] The court assumes that the KII stock is now worth more than $2 billion because the price of oil has increased more than 50% in the last year.

Howard and Vickie were married to the date of trial, the value of the stock increased by $449,754,134.

In 1982 J. Howard set up a Living Trust to hold his assets,[8] and eventually transferred the MPI stock into the Trust. J. Howard was the trustee. At the time of Vickie's marriage to J. Howard, Pierce and his family were the sole beneficiaries of the trust: neither Vickie nor J. Howard Marshall III had any beneficial interest in its assets. However, J. Howard had the power to revoke the Trust at any time, in which event the trust assets would revert to J. Howard.

For many years Pierce was fearful that his father J. Howard would give away a substantial part of the wealth that Pierce wanted to inherit. Pierce often argued with J. Howard about money and about J. Howard's gifts to Vickie. Pierce also resented the gifts that J. Howard gave to Lady Walker, his mistress who had died shortly before J. Howard met Vickie, and Pierce brought aggressive litigation against Lady Walker's heirs to challenge their right to what he considered Marshall property. J. Howard did not care about Pierce's views on these subjects.

As soon as Pierce learned of his father's marriage to Vickie, he contacted attorney Edwin Hunter, to take action to assure that Vickie did not receive any of the assets in the Living Trust. Pierce was concerned because his father had been especially generous to Lady Walker, his father's mistress for many years who had died in 1990, and he feared that his

[8] Exhibit A to the trust instrument is supposed to be a list of assets transferred into the trust. This exhibit has apparently never been produced in this adversary proceeding.

father would be equally generous to Vickie. In response, Hunter devised a plan to make the trust irrevocable, so that the assets would be protected for Pierce and his family.

The next week Pierce and Hunter met with J. Howard to review a document entitled, "J. Howard Marshall, II Post Nuptial Fine Tuning of Estate Plan" [hereinafter the Fine Tuning Document]. This document contained proposed amendments to the Living Trust.

J. Howard relied on Pierce and Hunter to inform him of the contents of the document. By that time J. Howard's eyesight had deteriorated to the point where he was not able to read any text finer than a newspaper headline.[9] Apparently, J. Howard signed[10] the Fine Tuning Document.[11]

However, the change that made the Living Trust irrevocable was not in the Fine Tuning Document at the time that J. Howard apparently signed it.[12] **Pierce caused this**

[9] However, J. Howard's mental capacities remained intact until his death.

[10] The records of Eyvonne Scurlock, the notary who allegedly notarized J. Howard's signature on the Fine Tuning Document, are in shambles and have no credibility. Among other defects, items are out of sequence, key pages are torn out, blank pages are interspersed between those containing notarial records, and she notarized signatures that she did not witness. Indeed, for the first ten years she served as a notary she kept no notarial records at all and did not know that they were required.

[11] The court is informed that the authenticity of J. Howard's signature on the trust amendment is at issue in the Texas Probate Court. This issue is left for decision by that court.

[12] In addition to what the court finds based on the evidence, the findings in this sentence are also adopted as sanctions for Pierce's discovery violations, as discussed *infra*.

change to be added to page two of the Document at a later date, likely after J. Howard's death.[13]

After his father's death, Pierce has continued his plot to prevent Vickie from obtaining any Marshall family assets. Pierce contends that essentially all of J. Howard's assets were in the Living Trust at the time of his death. Pierce stated that, if Vickie tried to get any of the assets, "it would be World War III." Indeed, the court finds that Pierce has adopted a scorched earth approach to the conduct of this litigation and has done his best to make it look like World War III.

III. Pierce's Discovery Abuses

The court previously found that Pierce engaged in massive discovery abuse in this adversary proceeding in connection with the production of documents properly requested under Rule 7034, which incorporates by reference Rule 34 of the Federal Rules of Civil Procedure.

Pierce's discovery infractions include four kinds of egregious discovery abuse. First, he failed to serve a written response within 30 days after the service of the request, as required by Rule 34(b) and incorporated by

[13] After trial, Vickie moved to reopen the record to submit the testimony of Donald J. Fandry, an expert who examined the Fine Tuning Document. The second page of the Document, which contains the provision making the trust irrevocable, is very different from the remaining pages of the document in the following respects: (1) this page alone lacks a watermark; (2) this page is missing a number of the staple holes that appear in the pages before and after, which result from a number of restaplings of the original document; and (3) this page was printed with a different printer from the rest of the document. This page, in its present form, was not part of the original document.

reference in Fed.R.Bankr.P. 7034.[14] Second, more than a year after the document production request (and after monetary sanctions had been imposed more than once), Pierce provided a privilege log which listed thousands of documents that were not produced based on claims of attorney-client privilege or work product. This privilege log was grossly insufficient for supporting his claim that the documents were not subject to discovery. Third, Pierce disobeyed altogether the court's order to submit these documents for examination in chambers to determine whether the documents qualified for discovery exemption. Fourth, Pierce destroyed a substantial quantity of documents that were subject to a pending discovery request. These egregious discovery abuses require that the court impose appropriate sanctions.[15]

A. Sending Documents to Attorney

Pierce testified that, upon J. Howard's death, he boxed up all of J. Howard's papers and sent them to Edwin Hunter in Lake Charles, Louisiana. These papers fall into two categories: papers belonging to MPI and personal papers that belonged to J. Howard at the time of his death. For both categories, Pierce's obligation to produce the documents is the same as if they were still in his personal possession. As to the documents belonging to MPI, Pierce was the president and sole director of MPI at all material times during this litigation and had the power and responsibility to produce the documents.

[14] Pierce also did not serve such a response at any reasonable time thereafter.

[15] These discovery abuses are not the only ones committed by Pierce, but only the most egregious.

As to the personal papers of J. Howard, Pierce was the administrator of J. Howard's probate estate in Louisiana when this adversary proceeding began,[16] when the document production requests were promulgated, when responses thereto came due, and when the documents should have been produced. The Louisiana probate case was ultimately dismissed for lack of jurisdiction and a new probate case was filed in Texas, where a different administrator was appointed. However, Pierce's default occurred during his watch, and his failure to produce the documents cannot be excused by his subsequent replacement by another administrator. Furthermore, the court is informed that Pierce's successor eventually waived any privilege that he had in the documents. Nonetheless, the documents were never produced in this adversary proceeding.

It is hornbook law that delivering pre-existing documents to a lawyer does not change a party's obligation to produce them in litigation. McCormick states:

> [T]his principle is controlling: If a document would be subject to an order for production if it were in the hands of the client it will be equally subject to such an order if it is in the hands of his attorney.

MCCORMICK ON EVIDENCE 330 (John William Strong, ed., 4th ed.1992); *accord, United States v. Robinson,* 121 F.3d 971, 975 (5th Cir.1997) ("it goes without saying that documents do not become cloaked with the lawyer-client privilege merely by the fact of their being passed from

[16] This adversary proceeding began as a claim that Pierce filed in this bankruptcy case for defamation, and Vickie's counterclaim that is the subject of this decision. Summary judgment was previously awarded to Vickie on the defamation claim, because Pierce offered no evidence to support the claim.

client to lawyer"); *Smith v. Texaco, Inc.,* 186 F.R.D. 354, 356-57 (E.D.Tex.1999). McCormick further states that any other rule "would be an intolerable obstruction to justice." MCCORMICK, *supra,* at 329.

Pierce had full responsibility for the production of all documents in either of these two categories that he sent to Hunter. When Vickie made demand for the production of the documents, Pierce's responsibility was to instruct Hunter to produce the documents for inspection or copying, or to raise any claimed defense to their discovery in a timely filed response. Hunter did neither.[17]

B. Claiming a Privilege

A party claiming a privilege has the burden of showing that the privilege applies. *United States v. Bauer,* 132 F.3d 504, 507 (9th Cir.1997). Federal common law governs the application of a privilege in an adjudication based on federal law. *See* Fed.R.Evid. 501. Where state law provides the applicable substantive law, privilege issues are governed by that state's law. *Id.* In this case, the causes of action at issue are governed by Texas law. Thus Texas law governs the issues of attorney-client privilege and work product.

The legal standard for the attorney-client privilege is as follows:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by his legal advisor, (8) except the protection be waived.

[17] If, after receiving such instructions, Hunter failed or refused to produce the documents, Pierce's remedy is against Hunter for violation of Hunter's duty as Pierce's agent to obey his lawful orders.

See 8 J. WIGMORE, EVIDENCE § 2292 at 554 (J. McNaughton rev.1961); *see also United States v. El Paso Co.,* 682 F.2d 530, 538 (5th Cir.1982); *Smith v. Texaco, Inc.,* 186 F.R.D 354, 356 (E.D.Tex.1999).

For each document transmitted to a non-attorney, Pierce must show, as to each such recipient, (a) the recipient's name, (b) the position that the recipient held at the time, (c) if the recipient received the document as a corporate official or employee, how the corporation's privilege applied to the recipient. *See Upjohn Co. v. United States,* 449 U.S. 383, 391-96, 101 S.Ct. 677, 683-86, 66 L.Ed.2d 584 (1981).

Pierce has not made an adequate showing on any of these issues, as to any of the documents at issue. While the names of some of the authors and recipients are given, none is identified as an attorney. The positions of the non-attorneys at the relevant times are not given, nor is any explanation given of how they qualify under *Upjohn.*

The court has serious reservations about the legitimacy of the attorney-client privilege and work product claims. Pierce did deliver more than 100 documents for *in camera* inspection that were in the possession of Jeff Townsend. The court found that approximately 13 of the documents were subject to a legitimate claim of attorney-client privilege or work product. For most of the remaining documents, the court found no good faith contention that either exception applied. The non-qualifying documents

included such items as transmittal letters, annual statements of KII, a videotape of J. Howard's arrival at Vickie's home to visit her after their marriage, and photographs of Vickie taken on vacation after J. Howard's death. The court infers from this evidence that most of the attorney-client privilege and work product claims for the Hunter documents are equally meritless.[18]

Because Pierce failed to carry the burden of showing the applicability of either the attorney-client privilege or the attorney work product doctrine, all of the documents on the privilege log should have been produced to Vickie in this litigation. They were not. The court concludes and finds that all of the privilege and work product claims relating to the Hunter documents were also specious and made in bad faith.

[18] If Ninth Circuit law had governed the procedures relating to the testing of the assertion of attorney-client privilege and work product, that law would require the party opposing the privilege claim to show a factual basis sufficient to support a reasonable, good faith belief that *in camera* inspection may reveal evidence that information in the materials is not privileged. *See In re Grand Jury Investigation,* 974 F.2d 1068, 1074-75 (9th Cir.1992); *see also United States v. Zolin,* 491 U.S. 554, 572, 109 S.Ct. 2619, 2631, 105 L.Ed.2d 469 (1989) (for determination of crime-fraud exception to attorney-client privilege, once threshold showing is made, court has discretion to conduct *in camera* review based on all the facts and circumstances of the case, including the relative importance to the case of the alleged privileged information, the likelihood that the evidence produced through *in camera* review (together with the other evidence in the case) will establish that the exception applies). The experience with the Townsend documents fully satisfies these requirements.

C. Sanctions for Discovery Violations

The court issued its findings and sanctions order on the discovery violations on May 20, 1999.[19] The court subsequently vacated that order. Meanwhile, Pierce has done nothing to vitiate his refusal to produce the documents at issue for an *in camera* inspection.

The findings of fact and conclusions of law highlighted in bold in this opinion or otherwise specified are imposed as sanctions for Pierce's discovery abuse. The court finds that many documents listed in the privilege log directly relate to the transactions as to which the sanctions are imposed. Furthermore, there is no way to know what was in the documents that Pierce destroyed while they were subject to a discovery request.

In addition, Edwin Hunter testified at the trial over Vickie's objections based on Hunter's failure to produce the Hunter documents or to submit them to the court for *in camera* inspection. The court now sustains those objections, and strikes Hunter's testimony.

IV. Tortious Interference with Expectancy of Inheritance or Gift

Texas law clearly recognizes tortious interference with an inheritance or gift as a valid cause of action. The leading Texas case is *King v. Acker,* 725 S.W.2d 750, 754 (Tex.App.1987); *see also Brandes v. Rice Trust, Inc.,* 966 S.W.2d 144, 146-47 (Tex.App.1998). In *King* the court

[19] The court issued a prior set of findings and sanctions on January 21, 1999, which were vacated by the district court and remanded for more specific findings.

sustained a claim for tortious interference with an expected inheritance in an action brought against the decedent's second wife by the decedent's two children from his first marriage. The court found that the second wife improperly attempted to assign 500 shares of stock to herself from the decedent while he was in a coma, pursuant to a power of attorney that the jury found the decedent had not signed.

King was the first published opinion declaring that Texas law recognizes a cause of action for tortious interference with inheritance rights. Following courts from other states, the court relied on the Restatement formulation of the rule, which states:

> One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift.

Restatement (Second) of Torts § 774B (1977). The court further supported its conclusion by stating:

> It is well understood that the law affords a remedy for every invasion of a legal right. Under the maxim "where there is a right, there is a remedy," equity will not suffer a right to be without a remedy.

King, 725 S.W.2d at 754. On these grounds the court upheld an award of both compensatory and punitive damages against the decedent's second wife for using the forged power of attorney to transfer stock from the decedent to herself while he was unconscious.

In *Brandes* the decedent's sister and her children brought an action against Rice University for tortiously

interfering with their expectancy to inherit some $4 million in municipal bonds that the decedent transferred to the university on his deathbed. The court ruled for the university because the decedent's will would not have left the bonds to the plaintiffs if the transfer to the university had not been made. *Brandes,* 966 S.W.2d at 149.

Texas case law does not specify the elements of a cause of action for tortious interference with an expectancy of inheritance or gift. Other jurisdictions, however, have generally held that a plaintiff must prove the following five elements: (1) the existence of an expectancy; (2) a reasonable certainty that the expectancy would have been realized, but for the interference; (3) intentional interference with that expectancy; (4) tortious conduct involved with the interference; and (5) damages. *See, e.g., Doughty v. Morris,* 117 N.M. 284, 871 P.2d 380, 384 (Ct.App.1994); *see also* James A. Fassold, *Tortious Interference with Expectancy of Inheritance: New Tort, New Traps,* ARIZ. ATT'Y, 26, 27 (Jan.2000); Dennis D. Reaves, *Tortious Interference with an Expected Gift or Inheritance,* J.MO.B. 563, 564 (1991).

A. Existence of an Expectancy

The court finds that Vickie had an expectancy to receive a substantial portion of J. Howard's wealth. J. Howard repeatedly told her that she would receive half of what he owned. While J. Howard never made a will with any provision for her, this was because his principal assets were already in the Living Trust. J. Howard's plan was to provide for Vickie from the Living Trust.

In December, 1992 J. Howard instructed both Sorensen and Hunter to arrange a gift to Vickie from the Trust.

J. Howard instructed Hunter, a tax and estate planning expert, to prepare a "catch-all trust" for Vickie. A few days later J. Howard instructed Sorensen to prepare the documents for a gift to Vickie of one-half of the future appreciation in J. Howard's interest in the MPI stock. No evidence has been offered that these instructions were ever rescinded.

B. Reasonable Certainty of Expectancy But For Defendant's Conduct

Vickie must show with a reasonable degree of certainty that she would have received the expectancy but for Pierce's interference. Comment d to § 774B states in relevant part:

> [T]here must be proof amounting to a reasonable degree of certainty that the bequest or devise would have been in effect at the time of the death of the testator or that the gift would have been made inter vivos if there had been no such interference. . . . Complete certainty is [often] impossible. It is not required. . . . The fact that it was the defendant's tortious act that makes it not possible to prove with certainty may be taken into consideration by the court.

RESTATEMENT, *supra,* cmt. d.

No evidence has been presented on why J. Howard's instructions to Sorensen and Hunter were not followed. The court assumes that the answers to this question lie in the documents that Pierce has destroyed or refused to produce. **The court finds that the gift to provide for Vickie did not take place because Pierce fired Sorensen and conspired with Hunter to prevent**

the drafting and execution of the documents that would have accomplished the gift that J. Howard directed.

Thus Vickie has adequately shown the reasonable certainty that she would have received a substantial gift from J. Howard, in the amount that the court hereafter awards as damages.

C. Intentional Conduct

Tortious interference with an expectancy is an intentional tort. A plaintiff must show an intentional invasion or destruction of plaintiff's prospective interest or expectancy of which the defendant had actual knowledge. Reaves, *supra,* at 564. The proof must show that the defendant was aware of his or her interference and in fact intended to interfere with the expectancy. Marilyn Marmai, Note, *Tortious Interference With Inheritance: Primary Remedy or Last Recourse,* 5 Conn.Prob.L.J. 295, 301 (1991).

When Pierce learned of J. Howard's directions to arrange a trust for Vickie in December 1992, he took action with Hunter to prevent the formation of the trust and the transfer of assets from the Living Trust for Vickie's benefit. Furthermore, in July 1994, upon learning of his father's marriage to Vickie, Pierce acted to assure that the marriage did not interfere with his own expectation that he and his family would inherit all of his father's wealth. There is no doubt that this conduct was intentional and specifically intended to prevent Vickie from obtaining any of the Marshall interest in MPI and KII.

Hunter, acting on **Pierce's instructions,** failed to prepare the catch-all trust. In addition, in 1994, **again**

acting on Pierce's instructions, Hunter devised a plan to make the Living Trust irrevocable and prepared the Fine Tuning Document to permit this to take place. After J. Howard apparently signed the Fine Tuning Document, Pierce caused the Document to be altered to substitute the page that made the Living Trust irrevocable. Whether in fact the Fine Tuning Document is genuine and effective to carry out this purpose will be decided by the Probate Court in Texas.

D. Independently Tortious Conduct

The most important element of tortious interference with the expectancy of an inheritance is that the defendant's conduct must be tortious. Typical examples of this tort occur where a testator has been induced to make or not to make a bequest by fraud, duress, defamation or tortious abuse of fiduciary duty, or the tortfeasor has forged, altered or suppressed a will (or a document making a gift). RESTATEMENT § 774B, *supra,* cmt. c; *see also* Fassold, *supra,* at 27. In contrast, persuading a testator to eliminate an expectancy through legitimate means is not enough to satisfy this element. *See* Reaves, *supra,* at 564.

Pierce's tortious conduct in this case came in two phases. **First, at the end of 1992 and in early 1993 he fired Sorensen for the purpose of preventing him from arranging the gift to Vickie of the increase in value of the MPI stock, and he conspired with Hunter to prevent the preparation of the catch-all trust.** Second, he caused the altering of the Fine Tuning Document, by substituting a new second page of the document after its apparent execution to insert a provision that purported to make the Living Trust irrevocable. This

independently tortious conduct supports Vickie's claim for tortious interference with her expectancy of an inheritance from her deceased husband J. Howard.

E. Damages

Vickie offers three different measures of damages for Pierce's wrongful conduct. First, she contends that the court should award damages that equal half of everything in which J. Howard had an interest. According to Vickie's expert Wayne Elggren,[20] half of J. Howard's interest in MPI, as of August 31, 1999 (immediately before the trial in this adversary proceeding), was worth $820,489,480. This amount would give effect to J. Howard's repeated promise that she would get half of what he had.

As a second possible measure of damages, Elggren testified that J. Howard's share of the appreciation in the KII stock from December 23, 1992 to August 31, 1999 was $556,874,869. This sum would give effect to J. Howard's instructions to Sorensen on or about that date to arrange a structure to give Vickie the appreciation in value of J. Howard's interest in the KII stock.

Elggren presented a third possible measure of damages, the increase in value of the MPI stock from June 27, 1994, the date of Vickie and J. Howard's marriage, to August 31, 1999. Elggren testified that the J. Howard's interest in the MPI stock increased during this period from $741,470,693 to $1,640,978,961, an increase of

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[20] The court finds all of Elggren's testimony on this subject to be credible.

$899,508,268. Vickie's half share of this sum would be $449,754,134.

Pierce's expert Mike Hill opined that the community property value of the KII stock was $170 million. **The court denied the admission of Hill's testimony as sanctions for Pierce's discovery violations, as discussed *supra* and as provided in the court's order of May 21, 1999.**

The court finds the most appropriate measure of Vickie's damages from Pierce's tortious interference with her expectancy of a gift from J. Howard to be the lowest of these figures, $449,754,134. While J. Howard gave the instructions to make the gift in 1992, the court finds that J. Howard gave this direction in contemplation that Vickie would marry him. In fact she did, but not until 1994. The court finds it equitable to measure her damages from the date of their marriage.

Vickie has actually been damaged only to the extent that she does not receive a share of the probate estate in Texas. The probate action is in trial now, and the amount that Vickie receives in that proceeding must be deducted to determine the damages that Pierce has caused.

F. Punitive Damages

Under Texas law, damages available for the tortious interference with an expectancy of an inheritance or gift may include consequential damages, emotional distress or actual harm to reputation, and punitive damages. *See King,* 725 S.W.2d at 754; *see also* Fassold, *supra,* at 29; Reaves, *supra,* at 565. Vickie has not shown any consequential damages, emotional distress or harm to reputation. However, she does claim punitive damages against Pierce.

It appears to the court that, under Texas law, this is an appropriate case for the assessment of punitive damages. However, the determination of the amount of punitive damages must await the calculation of the compensatory damages. This calculation, in turn, must await the determination of the amount, if any, that Vickie receives from J. Howard's estate.

V. Conclusion

The court concludes that Vickie has shown, by a preponderance of the evidence admitted at trial and the findings imposed as sanctions against Pierce for discovery abuses, that Pierce has tortiously deprived her of her expectancy of a substantial *inter vivos* gift from her deceased husband J. Howard.

The court awards damages in the amount of $449,754,134, less any amount that Vickie actually recovers in the pending Probate Court action in Texas. In addition, Vickie is entitled to punitive damages in an amount that remains to be determined after her actual damages are calculated.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: VICKIE LYNN MARSHALL, Debtor, --- E. PIERCE MARSHALL, Plaintiff-counter-defendant-Appellant, v. VICKIE LYNN MARSHALL, Defendant-counter-claimant-Appellee.	No. 02-56002, 02-56067 D.C. No. CV-01-00097-DOC Central District of California, Santa Ana ORDER (Filed Feb. 16, 2005)

Before: BEEZER, KLEINFELD, and PAEZ, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judges Kleinfeld and Paez vote to deny the petition for rehearing en banc and Judge Beezer so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

STATUTES INVOLVED

The statutes relevant to the present petition are set forth in full as follows.

A. 28 U.S.C. § 1331 (1993)

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

B. 28 U.S.C. § 1332 (a)-(c) (1993 & Supp. 2004)

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between –

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the

plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title –

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

C. 28 U.S.C. § 1334 (1993 & Supp. 2004)

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

(d) Any decision to abstain or not to abstain made under this subsection (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction

of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.